A/CN.4/SER.A/2014

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

2014

Volume I

Summary records
of the meetings
of the sixty-sixth session
5 May–6 June and
7 July–8 August 2014

UNITED NATIONS

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NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook …*, followed by the year (for example, *Yearbook … 2014*).

The *Yearbook* for each session of the International Law Commission comprises two volumes:

Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.

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This volume contains the summary records of the meetings of the sixty-sixth session of the Commission (A/CN.4/SR.3198–A/CN.4/SR.3243), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.

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Mr. Miguel de Serpa Soares, Under-Secretary-General of Legal Affairs, United Nations Legal Counsel, represented the Secretary-General. Mr. George Korontzis, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the United Nations Legal Counsel, represented the Secretary-General.

AGENDA

The Commission adopted the following agenda at its 3198th meeting, held on 5 May 2014:

1. Organization of the work of the session.
2. Expulsion of aliens.
3. The obligation to extradite or prosecute (*aut dedere aut judicare*).
4. Protection of persons in the event of disasters.
5. Immunity of State officials from foreign criminal jurisdiction.
6. Subsequent agreements and subsequent practice in relation to the interpretation of treaties.
7. The most-favoured-nation clause.
8. Provisional application of treaties.
9. Identification of customary international law.
10. Protection of the environment in relation to armed conflicts.
11. Protection of the atmosphere.
12. Programme, procedures and working methods of the Commission and its documentation.
13. Date and place of the sixty-seventh session.
14. Cooperation with other bodies.
15. Other business.

ABBREVIATIONS

AALCO	Asian–African Legal Consultative Organization
ASEAN	Association of Southeast Asian Nations
AUCIL	African Union Commission on International Law
CAHDI	Council of Europe Committee of Legal Advisers on Public International Law
IAJC	Inter-American Juridical Committee
IASC	Inter-Agency Standing Committee
ICRC	International Committee of the Red Cross
ITLOS	International Tribunal for the Law of the Sea
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of the Congo
NGO	non-governmental organization
OAS	Organization of American States
OAU	Organization of African Unity
UNESCO	United Nations Educational, Scientific and Cultural Organization
WHO	World Health Organization
WTO	World Trade Organization

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ECHR	European Court of Human Rights, *Reports of Judgments and Decisions.* All judgments and decisions of the Court, including those not published in the official series, can be consulted in the database of the Court (HUDOC), available from the Court's website (www.echr.coe.int).
I.C.J. Reports	International Court of Justice, *Reports of Judgments, Advisory Opinions and Orders.* All judgments, advisory opinions and orders of the Court are available from the Court's website (www.icj-cij.org).
ILR	*International Law Reports*
ITLOS Reports	ITLOS, *Reports of Judgments, Advisory Opinions and Orders.* Case law is available from the ITLOS website (www.itlos.org).
P.C.I.J., Series A	Permanent Court of International Justice, *Collection of Judgments* (Nos. 1–24: up to and including 1930)
UNRIAA	United Nations, *Reports of International Arbitral Awards*

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In the present volume, "International Tribunal for the Former Yugoslavia" refers to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991; and "International Tribunal for Rwanda" refers to the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994.

The references to Kosovo in this publication are to be understood in the context of Security Council resolution 1244 (1999) of 10 June 1999.

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NOTE CONCERNING QUOTATIONS

In quotations, words or passages in italics followed by an asterisk were not italicized in the original text.

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

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The Internet address of the International Law Commission is **http://legal.un.org/ilc/**.

CASES CITED IN THE PRESENT VOLUME

Case	*Nature and source of the decision*
Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo	*Advisory Opinion, I.C.J. Reports 2010*, p. 403.
Aerial Herbicide Spraying	*(Ecuador* v. *Colombia), Order of 13 September 2013, I.C.J. Reports 2013*, p. 278.
Ahmadou Sadio Diallo	*(Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639.
Al-Dulimi and Montana Management Inc. v. *Switzerland*	Application no. 5809/08, Judgment of 23 November 2013, Second Section, European Court of Human Rights.
Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. *Colombia)*	*Application instituting proceedings filed in the Registry of the Court on 26 November 2013*, 2013 General List No. 155.
Alpharma Inc. v. *Council of the European Union*	Case T-70/99, Judgment of 11 September 2002, Third Chamber, Court of the First Instance, Court of Justice of the European Communities, *European Court Reports 2002*, p. II-3495 (ECLI:EU:T:2002:210)..
Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. *Serbia and Montenegro)*	*Judgment, I.C.J. Reports 2007*, p. 43.
Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. *Serbia)*	*Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 412. The verbatim records of the public sittings held in 2014 are available from the Court's website: www.icj-cij.org/.
Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. *Greece)*	*Judgment of 5 December 2011, I.C.J. Reports 2011*, p. 644.
Arrest Warrant of 11 April 2000	*(Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3.
Ayyash et al.	Case No. STL-11-01, Special Tribunal for Lebanon. The Tribunal's decisions are available from: www.stl-tsl.org/en/the-cases/stl-11-01.
Balmer-Schafroth and others v. *Switzerland*	Application no. 22110/93, Judgment of 26 August 1997, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions 1997-IV*, p. 1346.
Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. *India)*	Award of 7 July 2014, available from: www.pca-cpa.org/en/cases/18.
Barcelona Traction	*Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 3.
Case concerning the Temple of Preah Vihear	*(Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6.
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Charles Taylor	*Prosecutor* v. *Charles Ghankay Taylor*, Case No. SCSL-03-01-A, Judgment of 26 September 2013, Appeals Chamber, Special Court for Sierra Leone (available from: www.rscsl.org/Taylor.html).
Chorzów Factory	*Case concerning the Factory at Chorzów, Judgment No. 13 (Merits) of 13 September 1928, P.C.I.J., Series A*, No. 17, p. 47.
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Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua) [SR 3208, para. 6]	*Judgment, I.C.J. Reports 2009*, p. 213.
EPA v. *EME Homer City Generation*	Decision of 29 April 2014, Supreme Court of the United States, 572 U.S. 489 (2014).
Erika	Case No. 04-84.265, Decision of 23 November 2004, Criminal Chamber, Cour de Cassation (France), *Bulletin criminel 2004*, No. 292, p. 1096.
Gabčikovo–Nagymaros Project	*(Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7.
Indus Waters Kishenganga Arbitration (Pakistan v. *India)*	*Award in the Arbitration regarding the Indus Waters Kishenganga between Pakistan and India*, Final Award of 20 December 2013, Permanent Court of Arbitration (available from: https://pca-cpa.org, *Cases*).
In re Doe	Judgment of 19 October 1988, Court of Appeals, Second Circuit (United States of America), 860 F. 2d 40 (1988). See ILR, vol. 121, p. 567.
Ioannis Kardassopoulos v. *Georgia*	Decision on Jurisdiction of 6 July 2007, Case No. ARB/05/18, International Centre for Settlement of Investment Disputes (available from: https://icsid.worldbank .org, *Cases*).
The Islamic Republic of Iran v. *the United States of America*	Case No. B1, Award No. 382-B1-FT of 31 August 1988, Iran–United States Claims Tribunal, *Iran–United States Claims Tribunal Reports*, vol. 19 (1989), p. 273.
Japan—Taxes on Alcoholic Beverages II	AB-1996-2, Report of the WTO Appellate Body (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R), adopted on 1 November 1996 (available from: www.wto.org /english/tratop_e/dispu_e/ab_reports_e.htm).
Jones and Others v. *the United Kingdom*	Applications nos. 34356/06 and 40528/06, Judgment of 14 January 2014, Fourth Section, European Court of Human Rights, *Reports of Judgments and Decisions 2014*.
Juridical Condition and Rights of Undocumented Migrants	Advisory Opinion OC-18/03 of 17 September 2003, Inter-American Court of Human Rights, Series A, No. 18.
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Kichwa Indigenous People of Sarayaku v. *Ecuador*	Merits and Reparations, Judgment of 27 June 2012, Inter-American Court of Human Rights, Series C, No. 245.
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Land Reclamation by Singapore in and around the Straits of Johor	*(Malaysia* v. *Singapore)*, Provisional Measures, Order of 8 October 2003, *ITLOS Reports 2003*, p. 10.
Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)	*Advisory Opinion, I.C.J. Reports 1971*, p. 16.
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Matter of the Bay of Bengal maritime boundary arbitration between the People's Republic of Bangladesh and the Republic of India	Award of 7 July 2014, Permanent Court of Arbitration (available from: https://pca-cpa.org, *Cases*).
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	Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 392.
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The MOX Plant Case	*(Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, *ITLOS Reports 2001*, p. 95.
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Nuclear Tests (New Zealand v. *France)*	*Judgment, I.C.J. Reports 1974*, p. 457.
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	(Marshall Islands v. *United Kingdom), Application instituting proceedings filed in the Registry of the Court on 24 April 2014*, 2014 General List No. 160 (available from the Court's website: www.icj-cij.org, *Cases*).
Prosecutor v. *Blaškić*	Case No. IT-95-14-AR108 *bis*, Judgment on the request of the Republic of Croatia for review of the Decision of Trial Chamber II of 18 July 1997, Judgment of 29 October 1997, Appeals Chamber, International Tribunal for the Former Yugoslavia, ILR, vol. 110 (1998), p. 688. Also available from: www.icty.org/x/cases/blaskic/acdec/fr/71029JT3.html.
Prosecutor v. *Duško Tadić a/k/a "Dule"*	Case No. IT-94-1-AR72, Decision on the Defence Motion of Interlocutory Appeal on Jurisdiction, Decision of 2 October 1995, International Tribunal for the Former Yugoslavia, *Judicial Reports 1994–1995*, vol. I, pp. 352 *et seq.*
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Trail Smelter	Awards of 16 April 1938 and 11 March 1941, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1905.
United States—Measures Affecting the Production and Sale of Clove Cigarettes	AB-2012-1, Report of the WTO Appellate Body (WT/DS406/AB/R), adopted on 24 April 2012 (available from: www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm).
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Waddenzee	*Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels* v. *Staatssecretaris van Landbouw, Natuurbeheer en Visserij*, Case C-127/02, Judgment of 7 September 2004, Grand Chamber, European Court Reports 2004, p. I-7405 (ECLI: EU:C:2004:482)..
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Yukos Universal Limited (Isle of Man) v. *the Russian Federation*	Case No. AA 227, Interim Award on Jurisdiction and Admissibility of 30 November 2009, Permanent Court of Arbitration (available from: https://pca-cpa.org, *Cases*).

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Pacific settlement of international disputes	
European Convention for the peaceful settlement of disputes (Strasbourg, 29 April 1957)	United Nations, *Treaty Series*, vol. 320, No. 4646, p. 243.
Privileges and immunities, diplomatic and consular relations, etc.	
Convention on the Privileges and Immunities of the United Nations (New York, 13 February 1946)	United Nations, *Treaty Series*, vol. 1, No. 4, p. 15, and vol. 90, p. 327.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	*Ibid.*, vol. 500, No. 7310, p. 95.
United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 December 2004)	*Official Records of the General Assembly, Fifty-ninth session, Supplement No. 49* (A/59/49), vol. I, Resolution 59/38, Annex .
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Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	*Ibid*., vol. 213, No. 2889, p. 221.
Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Strasbourg, 22 November 1984)	*Ibid*., vol. 1525, p. 195.
Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (Strasbourg, 24 June 2013)	Council of Europe, *Treaty Series*, No. 213.
Protocol No. 16 to the European Convention on Human Rights (Strasbourg, 2 October 2013)	*Ibid.*, No. 214.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171.
American Convention on Human Rights: “Pact of San José, Costa Rica” (San José, 22 November 1969)	*Ibid*., vol. 1144, No. 17955, p. 123.
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Convention for the protection of individuals with regard to automatic processing of personal data (Strasbourg, 28 January 1981)	United Nations, *Treaty Series*, vol. 1496, No. 25702, p. 65.
African Charter on Human and Peoples’ Rights (Nairobi, 27 June 1981)	OAU, document CAB/LEG/24.9/49 (1990); United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217.
Convention against torture and other cruel, inhuman or degrading treatment or punishment (New York, 10 December 1984)	*Ibid.*, vol. 1465, No. 24841, p. 85.
Convention (No. 169) concerning indigenous and tribal peoples in independent countries (Geneva, 27 June 1989)	*Ibid.*, vol. 1650, No. 28383, p. 383.
Convention on the rights of the child (New York, 20 November 1989)	*Ibid.*, vol. 1577, No. 27531, p. 3.
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (New York, 18 December 1990)	*Ibid.*, vol. 2220, No. 39481, p. 3.
Framework Convention for the protection of national minorities (Strasbourg, 1 February 1995)	*Ibid.*, vol. 2151, No. 37548, p. 243.
Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo, 27 June 2014)	Available from the website of the African Union: https://au.int, *Treaties*.
Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul, 11 May 2011)	Council of Europe, *Treaty Series*, No. 210.

	Source
Refugees and stateless persons	
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	United Nations, *Treaty Series*, vol. 189, No. 2545, p. 137.
Convention relating to the Status of Stateless Persons (New York, 28 September 1954)	*Ibid.*, vol. 360, No. 5158, p. 117.
OAU [Organization of African Unity] Convention governing the specific aspects of refugee problems in Africa (Addis Ababa, 10 September 1969)	*Ibid.*, vol. 1001, No. 14691, p. 45.
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Marrakesh Agreement Establishing the World Trade Organization (Marrakesh, 15 April 1994)	Ibid., vols. 1867–1869, No. 31874.
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Intergovernmental Agreement on Dry Ports (Bangkok, 1 May 2013)	Available from: https://treaties.un.org, *Depositary/Status of treaties* (*Multilateral Treaties Deposited with the Secretary-General*, chap. XI.E.3).
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European Convention on Extradition (Paris, 13 December 1957)	United Nations, *Treaty Series*, vol. 359, No. 5146, p. 273.
Fourth Additional Protocol to the European Convention on Extradition (Vienna, 20 September 2012)	Council of Europe, *Treaty Series*, No. 212.
Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (New York, 14 December 1973)	United Nations, *Treaty Series*, vol. 1035, No. 15410, p. 167.
Convention on the Safety of United Nations and Associated Personnel (New York, 9 December 1994)	*Ibid.*, vol. 2051, No. 35457, p. 363.
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Rome Statute of the International Criminal Court (Rome, 17 July 1998)	*Ibid*., vol. 2187, No. 38544, p. 3.
United Nations Convention against Transnational Organized Crime (New York, 15 November 2000)	*Ibid.*, vol. 2225, No. 39574, p. 209.
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United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3.
Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (New York, 28 July 1994)	*Ibid.*, vol. 1836, No. 31364, p. 3.
Law of treaties	
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

	Source
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15, published *in Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February–21 March 1986*, vol. II (United Nations publication, Sales No. E.94.V.5), p. 93.
Outer space	
Agreement governing the activities of States on the moon and other celestial bodies (New York, 5 December 1979)	United Nations, *Treaty Series*, vol. 1363, No. 23002, p. 3.
Assistance	
Convention on assistance in the case of a nuclear accident or radiological emergency (Vienna, 26 September 1986)	United Nations, *Treaty Series*, vol. 1457, No. 24643, p. 133.
ASEAN Agreement on Disaster Management and Emergency Response (Vientiane, 26 July 2005)	ASEAN, *Documents Series 2005*, p. 157.
SAARC [South Asian Associations for Regional Cooperation] Agreement on Rapid Response to Natural Disasters (Addu (Maldives), 11 November 2011)	Available from the SAARC website: http://saarc-sec.org/, *Digital library*.
Law applicable in armed conflict	
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	United Nations, *Treaty Series*, vol. 75, Nos. 970–973, p. 31.
Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (Geneva, 8 June 1977)	*Ibid.*, vol. 1125, No. 17512, p. 3.
Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) (Geneva, 8 June 1977)	*Ibid.*, No. 17513, p. 609.
Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954)	*Ibid.*, vol. 249, No. 3511, p. 215.
Disarmament	
Treaty on the Non-Proliferation of Nuclear Weapons (London, Moscow and Washington, D.C., 1 July 1968)	United Nations, *Treaty Series*, vol. 729, No. 10485, p. 161.
Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction (London, Moscow and Washington, D.C., 10 April 1972)	*Ibid.*, vol. 1015, No. 14860, p. 163.
Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction (opened for signature at Paris, 13 January 1993)	*Ibid.*, vol. 1974, No. 33757, p. 45, and vol. 1975, p. 3.
Arms Trade Treaty (New York, 2 April 2013)	A/CONF.217/2013/L.3, Annex, and *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 40* (A/67/49), vol. III, Resolution 67/234 B.
Liability	
Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993)	Council of Europe, *Treaty Series*, No. 150.
Environment	
International Convention for the Regulation of Whaling (Washington, D.C., 2 December 1946)	United Nations, *Treaty Series*, vol. 161, No. 2124, p. 72.

	Source
Agreement relating to a Special Maritime Frontier Zone (Lima, 4 December 1954)	*Ibid.*, vol. 2274, No. 40521, p. 527.
Convention on the prohibition of military or any other hostile use of environmental modification techniques (New York, 10 December 1976)	*Ibid.*, vol. 1108, No. 17119, p. 151.
Convention on long-range transboundary air pollution (Geneva, 13 November 1979)	*Ibid.*, vol. 1302, No. 21623, p. 217.
Protocol to the 1979 Convention on long-range transboundary air pollution on long-term financing of the cooperative programme for monitoring and evaluation of the long-range transmission of air pollutants in Europe (EMEP) (Geneva, September 28, 1984)	*Ibid.*, vol. 1491, No. 25638, p. 167.
Protocol to the 1979 Convention on long-range transboundary air pollution on the reduction of sulphur emissions or their transboundary fluxes by at least 30 per cent (Helsinki, 8 July 1985)	*Ibid.*, vol. 1480, No. 25247, p. 215.
Protocol to the 1979 Convention on long-range transboundary air pollution concerning the control of emissions of nitrogen oxides or their transboundary fluxes (with technical annex) (Sofia, 31 October 1988)	*Ibid.*, vol. 1593, No. 27874, p. 287.
Protocol to the 1979 Convention on long-range transboundary air pollution concerning the control of emissions of volatile organic compounds or their transboundary fluxes (with technical annex) (Geneva, 18 November 1991)	*Ibid.*, vol. 2001, No. 34322, p. 187.
Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions (with annexes) (Oslo, 14 June 1994)	*Ibid.*, vol. 2030, No. 21623, p. 122.
Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Heavy Metals (Aarhus, 24 June 1998)	*Ibid.*, vol. 2237, p. 4.
Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants (Aarhus, 24 June 1998)	*Ibid.*, vol. 2230, p. 79.
Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-level Ozone (with annexes) (Gothenburg, 30 November 1999)	*Ibid.*, vol. 2319, p. 80.
Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985)	*Ibid.*, vol. 1513, No. 26164, p. 293.
Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal, 16 September 1987)	*Ibid.*, vol. 1522, No. 26369, p. 3.
Basel Convention on the control of transboundary movements of hazardous wastes and their disposal (Basel, 22 March 1989)	*Ibid.*, vol. 1673, No. 28911, p. 57.
Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (Bamako, 30 January 1991)	*Ibid.*, vol. 2101, No. 36508, p. 177.
United Nations Framework Convention on Climate Change (New York, 9 May 1992)	*Ibid.*, vol. 1771, No. 30822, p. 107.
North American Agreement on Environmental Cooperation (Mexico, Washington, D.C. and Ottawa, 8, 9, 12 and 14 September 1993)	*Yearbook of International Environmental Law*, vol. 4, No. 1 (1993), p. 831. Available from the website of the Commission for Environmental Cooperation: www.cec.org.
Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998)	United Nations, *Treaty Series*, vol. 2161, No. 37770, p. 447.
Minamata Convention on Mercury (Kumamoto, 10 October 2013)	*Ibid.*, No. 54669.
General international law	
Charter of the Organization of American States (Bogotá, 30 April 1948)	United Nations, *Treaty Series*, vol. 119, No. 1609, p. 3.
Treaty on the Functioning of the European Union (Rome, 25 March 1957)	*Ibid.*, vol. 294, No. 4300, p. 3. See also the consolidated version of the Treaty, *Official Journal of the European Communities*, No. C 326, 26 October 2012, p. 47.
Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property (Paris, 14 November 1970)	*Ibid.*, vol. 823, No. 11806, p. 231.

	Source
Convention for the protection of the world cultural and natural heritage (Paris, 16 November 1972)	*Ibid.*, vol. 1037, No. 15511, p. 151.
Treaty on European Union (Maastricht Treaty) (Maastricht, 7 February 1992)	*Ibid.*, vol. 1757, No. 30615, p. 3.
The Energy Charter Treaty (Lisbon, 17 December 1994)	*Ibid.*, vol. 2080, No. 36116, p. 95.
Constitutive Act of the African Union (Lomé, 11 July 2000)	*Ibid.*, vol. 2158, No. 37733, p. 3.
European Convention on the protection of the Audiovisual Heritage (Strasbourg, 8 November 2001)	*Ibid.*, vol. 2569, No. 45793, p. 3.
Protocol to the European Convention for the Protection of the Audiovisual Heritage, on the Protection of Television Productions (Strasbourg, 8 November 2001)	Council of Europe, *Treaty Series*, No. 184.

CHECKLIST OF DOCUMENTS OF THE SIXTY-SIXTH SESSION

Document	*Title*	*Observations and references*
A/CN.4/665	Provisional agenda for the sixty-sixth session	Mimeographed. For agenda as adopted, see p. viii above.
A/CN.4/666	Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-eighth session, prepared by the Secretariat	Mimeographed.
A/CN.4/667	First report on the protection of the atmosphere, by Mr. Shinya Murase, Special Rapporteur	Reproduced in *Yearbook … 2014*, vol. II (Part One).
A/CN.4/668 [and Corr.1] and Add.1	Seventh report on the protection of persons in the event of disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur	*Idem.*
A/CN.4/669 and Add.1	Expulsion of aliens: Comments and observations received from Governments	*Idem.*
	Additional information received from the European Union (in English only), not included in document A/CN.44/669 and Add.1.	Mimeographed.
A/CN.4/670	Ninth report on the expulsion of aliens, by Mr. Maurice Kamto, Special Rapporteur	Reproduced in *Yearbook … 2014*, vol. II (Part One).
A/CN.4/671	Second report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, by Mr. Georg Nolte, Special Rapporteur	*Idem.*
A/CN.4/672	Second report on identification of customary international law, by Sir Michael Wood, Special Rapporteur	*Idem.*
A/CN.4/673 [and Corr.1]	Third report on the immunity of State officials from foreign criminal jurisdiction, by Ms. Concepción Escobar Hernández, Special Rapporteur	*Idem.*
A/CN.4/674 [and Corr.1]	Preliminary report on the protection of the environment in relation to armed conflicts, by Ms. Marie G. Jacobsson, Special Rapporteur	*Idem.*
A/CN.4/675	Second report on the provisional application of treaties, by Mr. Juan Manuel Gómez Robledo, Special Rapporteur	*Idem.*
A/CN.4/L.831	Protection of persons in the event of disasters: Texts and titles of the draft articles adopted by the Drafting Committee on first reading	Mimeographed.
A/CN.4/L.832	Expulsion of aliens: Texts and titles of the draft articles adopted by the Drafting Committee on second reading	*Idem.*
A/CN.4/L.833	Subsequent agreements and subsequent practice in relation to the interpretation of treaties: Texts and titles of draft conclusions 6 to 10 provisionally adopted by the Drafting Committee at the sixty-sixth session of the Commission	*Idem.*
A/CN.4/L.834	Draft report of the International Law Commission on the work of its sixty-sixth session, chapter I (Organization of the session)	*Idem.* See the adopted text in *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10). The final text appears in *Yearbook … 2014*, vol. II (Part Two).
A/CN.4/L.835	*Idem*, chapter II (Summary of the work of the Commission at its sixty-sixth session)	*Idem.*
A/CN.4/L.836	*Idem*, chapter III (Specific issues on which comments would be of particular interest to the Commission)	*Idem.*
A/CN.4/L.837 and Add.1/Rev.1	*Idem*, chapter IV (Expulsion of aliens)	*Idem.*
A/CN.4/L.838 and Add.1	*Idem*, chapter V (Protection of persons in the event of disasters)	*Idem.*

Document	*Title*	*Observations and references*
A/CN.4/L.839	*Idem*, chapter VI (Obligation to extradite or prosecute (*aut dedere aut judicare*))	*Idem.*
A/CN.4/L.840 and Add.1–3	*Idem*, chapter VII (Subsequent agreements and subsequent practice in relation to the interpretation of treaties)	*Idem.*
A/CN.4/L.841	*Idem*, chapter VIII (Protection of the atmosphere)	*Idem.*
A/CN.4/L.842 and Add.1	*Idem*, chapter IX (Immunity of State officials from foreign criminal jurisdiction)	*Idem.*
A/CN.4/L.843	*Idem*, chapter X (Identification of customary international law)	*Idem.*
A/CN.4/L.844	Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*)—Final report	Mimeographed.
A/CN.4/L.845	Draft report of the International Law Commission on the work of its sixty-sixth session, chapter XI (Protection of the environment in relation to armed conflicts)	*Idem.* See the adopted text in *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10). The final text appears in *Yearbook … 2014*, vol. II (Part Two).
A/CN.4/L.846	*Idem*, chapter XII (Provisional application of treaties)	*Idem.*
A/CN.4/L.847	*Idem*, chapter XIII (The most-favoured-nation clause)	*Idem.*
A/CN.4/L.848	*Idem*, chapter XIV (Other decisions and conclusions of the Commission)	*Idem.*
A/CN.4/L.849	Report of the Planning Group	Mimeographed.
A/CN.4/L.850	Immunity of State officials from foreign criminal jurisdiction: text of draft articles 2 (*e*) and 5 provisionally adopted by the Drafting Committee on 15 July 2014	*Idem.*
A/CN.4/SR.3198–A/CN.4/SR.3243	Provisional summary records of the 3198th to 3243rd meetings	*Idem.* The final text appears in the present volume.

INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FIRST PART OF THE SIXTY-SIXTH SESSION

Held at Geneva from 5 May to 6 June 2014

3198th MEETING

Monday, 5 May 2014, at 3.05 p.m.

Outgoing Chairperson: Mr. Bernd H. NIEHAUS

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti.

Opening of the session

1. The OUTGOING CHAIRPERSON declared open the sixty-sixth session of the International Law Commission.

Statement by the outgoing Chairperson

2. The OUTGOING CHAIRPERSON said that the consideration of the report of the International Law Commission on the work of its sixty-fifth session[1] had been a high point in the Sixth Committee's deliberations. The Sixth Committee had continued its practice of holding an interactive dialogue with those Commission members and Special Rapporteurs who were present in New York. During the discussion, which had been pursued at meetings with legal advisers, delegations had been invited to focus on the topics "Reservations to treaties" and "Crimes against humanity". At the close of the debate on the Commission's report, the General Assembly had adopted, on 16 December 2013, resolution 68/112, paragraph 6 of which took note of the Commission's decision to include the topics "Protection of the environment in relation to armed conflicts" and "Protection of the atmosphere" in its programme of work. In paragraph 7 of the resolution, the General Assembly invited the Commission to continue to give priority to the topics "Immunity of State officials from foreign criminal jurisdiction" and "The obligation to extradite or prosecute (*aut dedere aut judicare*)", and in paragraph 8, it took note of the inclusion of the topic "Crimes against humanity" in the Commission's long-term programme of work.[2] The General Assembly had also adopted resolution 68/111 on 16 December 2013, in which it welcomed the completion of the Commission's work on reservations to treaties and took note of the Guide to Practice on Reservations to Treaties annexed to the resolution.[3]

Election of officers

Mr. Gevorgian was elected Chairperson by acclamation.

Mr. Gevorgian took the Chair.

3. The CHAIRPERSON thanked the members of the Commission for the honour they had conferred on him in electing him to chair the current session. He paid a tribute to Mr. Niehaus, Chairperson of the sixty-fifth session, and the other officers of that session for their excellent work.

Mr. Murase was elected First Vice-Chairperson by acclamation.

Ms. Escobar Hernández was elected Second Vice-Chairperson by acclamation.

Mr. Saboia was elected Chairperson of the Drafting Committee by acclamation.

Mr. Tladi was elected Rapporteur by acclamation.

Adoption of the agenda (A/CN.4/665)

The agenda was adopted.

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[1] *Yearbook … 2013*, vol. II (Part Two).

[2] *Ibid*., p. 78, para. 169.

[3] The guidelines constituting the Guide to Practice on Reservations to Treaties adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2011*, vol. II (Part Three), chap. IV, sects. F.1 and F.2, pp. 37 *et seq*.

4. Following a brief exchange of views, the CHAIRPERSON suggested that the Enlarged Bureau be convened for discussions of substantive issues.

It was so decided.

The meeting was suspended at 3.50 p.m. and resumed at 4.55 p.m.

Organization of the work of the session

[Agenda item 1]

5. The CHAIRPERSON drew attention to the programme of work for the first two weeks of the session. If he heard no objection, he would take it that the Commission wished to adopt the proposed programme of work.

It was so decided.

Protection of persons in the event of disasters[4] (A/CN.4/666, Part II, sect. C,[5] A/CN.4/668 and Add.1,[6] A/CN.4/L.831[7])

[Agenda item 4]

Seventh report of the Special Rapporteur

6. Mr. VALENCIA-OSPINA (Special Rapporteur), introducing his seventh report on the protection of persons in the event of disasters (A/CN.4/668 and Add.1), said that the debate on the topic had been planned so as to facilitate the adoption of all the draft articles on first reading during the first part of the session. The text would then be ready for transmission to Governments for comments and observations.

7. His report consisted of four chapters. Chapter I briefly summarized the consideration of the topic by the Commission at its previous session and by the Sixth Committee at the sixty-eighth session of the General Assembly.

8. Chapter II dealt with the protection of relief personnel and their equipment and goods. It contained a proposal for an additional draft article 14 *bis*, entitled "Protection of relief personnel, equipment and goods", which read: "The affected State shall take all necessary measures to ensure the protection of relief personnel, equipment and goods present in its territory for the purpose of providing external assistance."

9. International humanitarian missions were confronted with significant risks for their personnel, most commonly in cases where international actors had to operate in situations of armed conflict or in States affected by a general deterioration of security conditions. Relevant in that regard was Security Council resolution 2139 (2014) of 22 February 2014, on the situation in Syria, in which the Council condemned "all acts or threats of violence against United Nations staff and humanitarian actors, which have resulted in the death, injury and detention of many humanitarian personnel" (fifth preambular paragraph). The Security Council also urged "all parties to take all appropriate steps to ensure the safety and security of United Nations personnel, those of its specialized agencies, and all other personnel engaged in humanitarian relief activities, without prejudice to their freedom of movement and access" (para. 12).

10. Clearly, the situation that had given rise to that Security Council resolution was an armed conflict, to which international humanitarian law applied. However, in other disaster situations, the possibility that relief personnel and their equipment and goods might face risks was no less real. Accordingly, such situations must be covered by the legal regime of protection being formulated by the Commission.

11. The specific duty to ensure the protection of personnel, equipment and goods attached to relief operations did not overlap with the parallel though distinct obligation embodied in draft article 14, namely, the facilitation of external assistance. Even if the guarantee of protection of civilian and military relief personnel and their goods and equipment might, broadly speaking, be assimilated to facilitation of external assistance, its specific nature and scope differed from the measures envisaged in draft article 14. Whereas the primary objective of that article was for the affected State to guarantee the existence of a domestic legal order facilitating external assistance, the purpose of draft article 14 *bis* was for that State to endeavour to establish the security conditions required for the conduct of relief operations, thus making it possible to guarantee the protection of personnel, equipment and goods. The proposed new draft article had been numbered 14 *bis* in recognition of its relationship with article 14.

12. The need to maintain as distinct the obligations pertaining to the facilitation of external assistance, on the one hand, and those concerning the protection of relief personnel, equipment and goods, on the other, was clearly reflected in international practice, as evidenced in universal, regional and bilateral treaties, as well as in "soft law" instruments.

13. Section C of chapter II of the seventh report of the Special Rapporteur dealt with categories of relief personnel and their equipment and goods in light of the relevant provisions of international treaties and instruments and the draft articles provisionally adopted by the Commission. Some basic limitations were explicitly incorporated in the relevant treaties, for example, the requirement that relief personnel, equipment and goods should be considered as such only when they were so designated by the States parties to the treaty. However, provisions found in several of the existing treaties did not specifically include or exclude other categories of humanitarian personnel that might become part of the relief effort.

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[4] At its sixty-second session (2010), the Commission provisionally adopted draft articles 1 to 5 and the commentaries thereto (*Yearbook … 2010*, vol. II (Part Two), pp. 185 *et seq.*, paras. 330–331). At its sixty-third session (2011), the Commission provisionally adopted draft articles 6 to 11 and the commentaires thereto (*Yearbook … 2011*, vol. II (Part Two), pp. 153 *et seq*., paras. 288–289). At its sixty-fifth session (2013), the Commission provisionally adopted draft articles 5 *bis*, 5 *ter*, 12 to 16, and the commentaries thereto (*Yearbook … 2013*, vol. II (Part Two), pp. 52 *et seq*., paras. 61–62).

[5] Mimeographed, available from the Commission's website.

[6] Reproduced in *Yearbook … 2014*, vol. II (Part One).

[7] Mimeographed, available from the Commission's website.

14. The absence of specific exclusions could not be interpreted as implying that any person or entity present in the territory of the affected State with the aim of providing support in the relief efforts could automatically qualify as being entitled to coverage under the provisions affording protection. Treaties constantly reaffirmed a basic tenet of humanitarian assistance in the event of disasters, namely, the need to secure the consent of the affected State for the provision of external assistance and the primary role of that State in the direction, coordination and supervision of assistance and relief activities undertaken by various actors. The goal of the obligation of protection embodied in the relevant international treaties was to induce States to act with due diligence, making their best efforts to guarantee the safety and security of those humanitarian actors whose support had been accepted, as well as of the goods and equipment to be used in connection with their participation in disaster relief.

15. Section D of chapter II of the report made reference to the measures to be adopted by affected States to fulfil their duty to protect relief personnel and their equipment and goods. Such measures might differ in content and could imply different forms of State conduct.

16. A preliminary requirement was for affected States to respect the negative aspect of such an obligation, so as to prevent their State organs from being directly involved in pursuing detrimental activities with regard to relief personnel and their equipment and goods. In that sense, the obligation was one of result. The fulfilment of the obligation through the positive action to be inferred from the duty to protect raised rather more complex issues. In order to avoid detrimental activities of that kind, carried out by individuals in their private capacity, affected States were required to show due diligence in taking the necessary preventive measures. The duty to protect disaster relief personnel, goods and equipment could, therefore, be qualified as an obligation of conduct and not of result.

17. Obligations of conduct required States to endeavour to attain the objective of an obligation rather than to succeed in achieving it. Measures to be taken by States in the realization of their best efforts to achieve the expected objective were, consequently, context-dependent. With regard to disaster situations, a series of circumstances might be relevant in evaluating the appropriateness of the measures to be taken.

18. At the same time, security risks should be evaluated bearing in mind the comprehensive character of relief missions and the need to guarantee to victims an adequate and effective response to a disaster. International humanitarian actors could themselves contribute to the realization of the goal sought by adopting a series of mitigation measures geared to reducing their vulnerability to security threats. In spite of any preventive measures that might be adopted, harmful acts could still be committed against relief personnel, their equipment and goods. Those unlawful activities should be prosecuted by the affected State, exercising its inherent competence to repress crimes committed within its jurisdiction. In that regard, a useful role might also be played by the Convention on the Safety of United Nations and Associated Personnel of 1994 and its Optional Protocol of 2005 for the States parties thereto. That Convention required States parties to ensure the security and safety of certain categories of personnel (art. 7) and to repress specific crimes listed in the Convention, based on a prosecute-or-extradite approach (arts. 14–15). However, in order for those provisions to apply, United Nations and associated personnel must be involved in one of the missions identified in the Convention (art. 1).

19. The applicability of the Convention to humanitarian relief personnel responding to a disaster was restricted by the requirement that the Security Council or the General Assembly make a declaration of exceptional risk.[8] However, to date, no such declarations had ever been adopted by either of those organs.

20. The Optional Protocol extended the application of the Convention, without the added requirement of a declaration of exceptional risk, to operations conducted for, among other things, the purpose of delivering emergency humanitarian assistance (art. II, para. 1). While the latter scenario was relevant to a series of missions conducted in the framework of disaster response, the host State was authorized under the Protocol to make a declaration to the Secretary-General of the United Nations that it would not apply its provisions with respect to "an operation … which is conducted for the sole purpose of responding to a natural disaster" (art. II, para. 3). This possibility to opt out had never been utilized by States parties thus far.

21. Chapter III of the seventh report of the Special Rapporteur proposed three draft articles that contained general or saving clauses relating to the interaction of the draft articles with other rules of international law applicable in disaster situations. Draft article 17, entitled "Relationship with special rules of international law", read: "The present draft articles do not apply to the extent that they are inconsistent with special rules of international law applicable in disaster situations."

22. Draft article 18, entitled "Matters related to disaster situations not regulated by the present draft articles", read: "The applicable rules of international law continue to govern matters related to disaster situations to the extent that they are not regulated by the present draft articles."

23. Draft article 19, entitled "Relationship to the Charter of the United Nations", read: "The present draft articles are without prejudice to the Charter of the United Nations."

24. Section A of chapter III of the report concerned the relationship between the draft articles and special rules of international law. To seek guidance in formulating a provision aimed at harmonizing that relationship, section A examined existing multilateral treaties of a universal or regional nature, as well as "soft law" instruments and documents prepared by authoritative bodies, which addressed issues of disaster prevention and response from a general perspective. The survey of those various instruments

[8] See paragraphs 7 and 8 of General Assembly resolution 58/82 of 9 December 2003, and paragraph 5 (*b*) of Security Council resolution 1502 (2003) of 26 August 2003.

suggested that, whenever States and expert bodies proceeded to regulate the relationship between, on the one hand, a disaster-related instrument with a broad scope of application, and on the other hand, treaties or other rules of international law having a more specific focus, the prevalent solution had been to confer primacy to the latter category of norms. It would, after all, be incongruous to give primacy to provisions establishing general rules for international cooperation in the event of disasters, such as those contained in the Commission's draft, over the specific norms contained in bilateral or multilateral treaties.

25. The Commission had already addressed the relationship between the rules enshrined in its draft articles and a special branch of international law when it dealt with the possible interaction between the draft articles and international humanitarian law. In its commentary to draft article 4, the Commission had endorsed the commonly accepted view that international humanitarian law represented the special law applicable during armed conflicts and should take precedence over the draft articles.[9] However, the Commission had also emphasized, in paragraph (2) of that commentary, that draft article 4 should not be interpreted as warranting the blank exclusion of the applicability of the draft articles during armed conflicts unfolding on a territory struck by a disaster, as that would be detrimental to the protection of the victims of the disaster. Thus, while prevalence was given to international humanitarian law as the special body of laws applicable in armed conflict, the concurrent applicability of the present draft articles was preserved during armed conflicts unfolding on a territory struck by disaster. Draft article 17 on the relationship between the draft and special rules of international law mirrored the wording of draft article 17 of the draft articles on diplomatic protection.[10]

26. Section B of chapter III of the seventh report of the Special Rapporteur concerned rules of international law covering disaster-related matters not regulated by the draft articles. The subject was addressed in draft article 18, which reproduced, *mutatis mutandis*, article 56 of the articles on the responsibility of States for internationally wrongful acts.[11] The insertion of such a provision, intended to complement draft article 17, would help to shed light on the interaction between the present draft articles and customary international law applicable in disaster situations. It would also make it clear that the content of the present draft articles did not interfere with treaty law having a different scope.

27. Section C of chapter III of the report concerned the relationship of the draft articles to the Charter of the United Nations, which was the subject of draft article 19, itself worded in light of Article 103 of the Charter. Like various treaties and other international instruments concerning disasters, the draft articles highlighted the cardinal role played by some principles enshrined in the Charter—sovereign equality of States, non-intervention, cooperation and non-discrimination—in defining the rights and duties of States in the event of disasters. The inclusion of a provision reaffirming the primacy of these obligations might also help to strengthen the leading role played by the United Nations in disaster management.

28. The seventh report concluded with draft article 3 *bis*, entitled "Use of terms". Draft article 3 *bis* read:

"For the purposes of the present articles:

"(*a*) 'Affected State' means the State upon whose territory persons or property are affected by a disaster;

"(*b*) 'Assisting State' means a State providing assistance to an affected State at its request or with its acceptance;

"(*c*) 'Other assisting actor' refers to an international organization, non-governmental organization, or any other entity or person, external to the affected State, which is engaged in disaster risk reduction or the provision of disaster relief assistance;

"(*d*) 'External assistance' refers to relief personnel, equipment and goods, and services provided to an affected State by assisting States or other assisting actors, with the objective of preventing, or mitigating the consequences of disasters or meeting the needs of those affected by a disaster;

"(*e*) 'Equipment and goods' includes supplies, tools, machines, specially trained animals, foodstuffs, drinking water, medical supplies, means of shelter, clothing, bedding, vehicles and other objects necessary for the provision of disaster relief assistance and indispensable for the survival and the fulfilment of the essential needs of the victims of disasters;

"(*f*) 'Relevant non-governmental organization' means any organization, including private and corporate entities, other than a State or governmental or intergovernmental organization, working impartially and with strictly humanitarian motives, which because of its nature, location or expertise, is engaged in disaster risk reduction or the provision of disaster relief assistance;

"(*g*) 'Relief personnel' means specialized personnel, including military personnel, engaged in the provision of disaster relief assistance on behalf of an assisting State or other assisting actor, as appropriate, having at their disposal the necessary equipment and goods;

"(*h*) 'Risk of disasters' means the probability of harmful consequences or losses with regard to human life or health, livelihood, property and economic activity, or damage to the environment, resulting from a disaster."

29. The inclusion of a provision on the use of terms was in conformity with the Commission's past practice. Such a provision could be formulated most efficiently when all of the draft articles on a given topic had been adopted. Since the current draft included provisions on the text's

[9] *Yearbook … 2010*, vol. II (Part Two), p. 188 (para. (1) of the commentary to draft article 4).

[10] General Assembly resolution 62/67 of 6 December 2007, annex. See the draft articles on diplomatic protection adopted by the Commission at its fifty-eighth session and the commentaries thereto in *Yearbook … 2006*, vol. II (Part Two), pp. 24 *et seq*., paras. 49–50.

[11] General Assembly resolution 56/83 of 12 December 2001, annex. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq*., paras. 76–77.

scope (draft article 1) and purpose (draft article 2) and on the definition of disaster (draft article 3), the draft article on the use of terms was provisionally numbered 3 *bis*, without prejudice to its ultimate location.

30. In elaborating his proposal, the Special Rapporteur had focused first on terms that, according to the commentaries, had already been singled out for definition, on terms often encountered in the draft articles themselves and on terms of art. On that basis, he had identified the following key terms: "affected State", "assisting State", "other assisting actor", "external assistance", "equipment and goods", "relevant non-governmental organization", "relief personnel" and "risk of disasters". He had next examined the commentaries to ascertain whether some elements of a definition had already been adopted by the Commission before turning to the applicable definitions found in other instruments. Having had recourse to all of those sources, he had arrived at a list of composite definitions, either taking elements from different sources, as appropriate, or using one as a basis but modifying it to reflect the language and decisions embodied in the draft articles already adopted.

31. Mr. HMOUD asked what legal value the Special Rapporteur assigned to draft article 14 *bis*: did it fall into the category of customary law?

32. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he would respond to the question when summing up the debate, but in the meantime, he looked forward to hearing Mr. Hmoud's thoughts on the subject, given his experience as one of the framers of the Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel.

33. Mr. MURASE said that he saw two problems with draft article 14 *bis*. First, a clear distinction should be drawn between civilian and military relief personnel, since a distinct legal regime governed each. Second, attention should be paid not only to the protection of relief personnel, but also to the protection of the population of the affected State from any harmful acts that might be committed by such personnel.

34. The exceptions or special benefits enjoyed by civilian relief personnel, who were subject to the domestic law of the affected State, were distinct from the privileges and immunities enjoyed by military personnel by virtue of agreements concluded between the sending and affected States. Draft article 14, paragraph 1 (*a*), referred, incorrectly, to the "privileges and immunities" of both civilian and military personnel, and that wording should be amended.

35. Following major disasters, military forces were virtually the only means for carrying out relief activities. As self-supporting units, they were well placed for conducting widespread operations systematically and swiftly, unlike civilian personnel, representatives of non-governmental organizations (NGOs) and volunteers.

36. In paragraph 43 of his seventh report, the Special Rapporteur referred to the use of "armed escorts" in relief operations, but the activities requested of military forces in actual disaster situations extended beyond the mere provision of armed escorts. In addition, the assertion in that paragraph that the security concerns surrounding relief operations in disaster situations were generally far less serious that those present in situations involving armed conflict was not entirely accurate. It overlooked the fact that in some cases, desperate disaster victims turned into mobs, looting stores and attacking police stations. Lastly, the Special Rapporteur indicated in paragraph 44 of his report that the preservation of law and order was a duty reserved for the military and police forces of the affected State. However, it was not always possible to maintain those forces in a full state of readiness. Therefore, affected States should always be prepared to receive foreign military assistance.

37. It was admittedly a sensitive matter for an affected State to invite a foreign military force into its territory without a status-of-forces agreement. The lack of such an agreement was also a source of insecurity for the sending State. Yet in the immediate aftermath of a disaster, the affected State often did not have the capacity to negotiate one. It was for that reason that he had suggested in 2012 that the Commission should develop a model status-of-forces agreement and annex it to the draft articles.[12] The States concerned could then agree to the provisional application of the model until a more detailed agreement could be negotiated, and the latter could be worked out more expeditiously thanks to the availability of the model. Although his proposal had not been accepted, the draft articles should at least refer to the need for States concerned to prepare a status-of-forces agreement in the pre-disaster phase in order to facilitate the swift reception and deployment of a foreign military force and to safeguard the population of the affected State from illegal acts that might be committed by the military personnel of the sending State.

38. Consequently, he proposed the insertion of a new draft article 14 *ter*, which would read:

> "States are encouraged in the pre-disaster phase to negotiate a status-of-forces agreement for relief activities conducted by military personnel in the event of disasters, detailing, among others, exemption from entry and departure procedures, freedom of movement, wearing of uniforms, exemption from duties or taxes and export-import restrictions on goods and equipment, other privileges and immunities, communication issues, use of vehicles, vessels and aircrafts, and temporary domestic legal status, including the scope of immunity from jurisdiction of the host country and settlement of claims."

39. With regard to the saving clauses in draft articles 17, 18 and 19, consideration should be given to merging them into a single article. He was in favour of referring all the proposed articles, including article 3 *bis* on the use of terms, to the Drafting Committee.

The meeting rose at 6 p.m.

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[12] See *Yearbook … 2012*, vol. I, 3138th meeting, p. 57, para. 30.

3199th MEETING

Tuesday, 6 May 2014, at 10.10 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti.

Expulsion of aliens[13] (A/CN.4/669 and Add.1,[14] A/CN.4/670,[15] A/CN.4/L.832[16])

[Agenda item 2]

NINTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited the Special Rapporteur, Mr. Maurice Kamto, to present his ninth report on the expulsion of aliens (A/CN.4/670).

2. Mr. KAMTO (Special Rapporteur) said that in fact no State had abided by the final date for the submission of comments on the text of the draft articles on the expulsion of aliens and the commentaries thereto, which the International Law Commission had adopted on first reading at its sixty-fourth session. He had endeavoured to reply as exhaustively as possible to all those comments in his ninth report. He had been unable to take account of the comments of the United States of America, which had reached him too late, but he would reply to them orally. He would be unable to do the same with respect to the comments of the Russian Federation, which he had received later still, with the notable exception of those relating to draft article 12, which were essentially similar to those of other States. As he would not be able to do justice to States' comments and his own replies to them if he summarized the report, he would concentrate on the comments of the United States.[17]

3. As far as draft article 2 (Use of terms) was concerned, the United States had proposed the insertion in subparagraph (*a*) of the criterion of intention, to which reference was made in draft article 11 on the prohibition of disguised expulsion, and it had requested the harmonization of terminology in those draft articles, as draft article 2 used the word "compelled" (*contraint*) in the phrase "compelled to leave" and draft article 11 employed the term "forcible" (*forcé*)[18] when it spoke of "forcible departure". Since in French the terms "*contraint*" and "*forcé*" were synonymous, he would prefer to retain the current wording, but if the Commission were to decide otherwise, he would not object to "compelled" being replaced with "forced". In order to incorporate the criterion of intention, he proposed the addition of the word "intentional" before "conduct" in the definition of expulsion contained in draft article 2 (*a*).

4. The United States had proposed that draft article 3 (Right of expulsion) be recast to read:

> "A State has the right to expel an alien from its territory. The rules applicable to the expulsion of aliens provided for in the present draft articles are without prejudice to other applicable rules of international law on the expulsion of aliens, in particular those relating to human rights."[19]

5. That suggestion which, at first sight, was apparently no more than an editorial preference, in fact sought to convey the idea that States were not strictly bound by the rules set forth in the draft articles and that they could argue that they were expelling someone on the basis of other rules of international law. He considered it inadvisable to grant that request, since it would in effect deprive the whole set of draft articles of any value.

6. The United States had had difficulty in understanding the exact purpose of paragraph 2 of draft article 6 (Prohibition of the expulsion of refugees), because it concerned a refugee whose application for refugee status was still pending.[20] He drew attention to the fact that, in international refugee law and international practice in that matter, it was not the granting of refugee status by the receiving State that conferred on the beneficiary the status of refugee within the meaning of international law, but the events and circumstances that had led that person to seek refuge in the territory of a foreign State. There was therefore no inconsistency or ambiguity in that clause.

7. With regard to draft article 9 (Deprivation of nationality for the sole purpose of expulsion), the United States understood that the draft article was not directed at a situation where an individual voluntarily relinquished his or her nationality and believed that it would be useful to indicate as much, possibly in paragraph (3) of the commentary.[21] Although that point was axiomatic and that situation did not, under any circumstances, fall within the purview of draft article 9, he had no objection to the addition in the commentary of the sentence: "Similarly, draft article 9 does not refer to situations where an individual voluntarily relinquishes his or her nationality."

8. In draft article 10 (Prohibition of collective expulsion), the United States had proposed that the final phrase of paragraph 3 be amended to read "and on the basis of

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[13] At its sixty-fourth session (2012), the Commission adopted on first reading the draft articles on the expulsion of aliens and the commentaries thereto (*Yearbook … 2012*, vol. II (Part Two), pp. 15 *et seq*., paras. 45–46).

[14] Reproduced in *Yearbook … 2014*, vol. II (Part One).

[15] *Idem*.

[16] Mimeographed, available from the Commission's website.

[17] See A/CN.4/669 and Add.1.

[18] *Ibid*., para. 2 of the observations of the United States on draft article 2.

[19] *Ibid*., para. 2 of the observations of the United States on draft article 3.

[20] *Ibid*., para. 1 of the observations of the United States on draft article 6.

[21] *Ibid*., observations of the United States on draft article 9.

an examination of the particular case of each individual member of the group consistent with the standards reflected in draft article 5, paragraph 3".[22] That proposal improved the wording of the draft article and was worth keeping, subject to the amendment of the end of the phrase to read "in accordance with the provisions of article 5, paragraph 3, of these draft articles".

9. With regard to draft article 13 (Prohibition of the resort to expulsion in order to circumvent an extradition procedure), the United States believed that States had the prerogative to use "a wide range" of legal mechanisms to facilitate the transfer of an individual to another State where he or she was sought for criminal proceedings and that, as it stood, draft article 13 might impede the exercise of that prerogative.[23] He considered that such a prerogative would not be diminished in any way by that provision, since it would be exercised in accordance with the law or pursuant to an obligation under international law, as was clearly indicated in the commentary to the draft article in question.[24]

10. In paragraph 2 of draft article 16 (Vulnerable persons) the United States had proposed the replacement of the adjective "primary" with "significant" or of the words "primary consideration" with "given due consideration".[25] He pointed out that the term "primary consideration" was drawn from the case law and should therefore be retained.

11. As to draft article 19 (Detention conditions of an alien subject to expulsion), the United States had urged that the word "generally" be inserted after "shall" in paragraphs 1 (*b*) and 2 (*a*).[26] He considered that this insertion would be a source of imprecision which was inherent in the adverb in question and that it would weaken the provisions concerned. The suggestion seemed all the more unjustified in paragraph 1 (*b*) because it already contained a derogation clause. Similarly, there was no point to the proposal that the phrase "or is necessary on grounds of national security or public order" be inserted at the end of paragraph 3 (*b*), since the whole law on the expulsion of aliens was framed without prejudice to every State's need to safeguard its national security and public order in circumstances defined by law.

12. The United States had proposed the insertion of draft article 20 (Obligation to respect the right to family life) in part three, chapter I,[27] but he saw no reason to move it. The United States had also wondered whether the protection offered by that draft article was absolute. The Commission had already replied to that query in the negative in the commentary by making it clear that the right to family life of an alien subject to expulsion might "be subject to limitations".[28] The United States had further proposed replacing the verb "respect" with "give due consideration to",[29] which did not reflect the terminology of the international texts and pertinent case law cited in the commentary. Those legal instruments often employed the noun "interference" or the verb "interfere" and the verb "respect" conveyed the idea of prohibiting interference better than the expression "give consideration to". Only a cursory reading could lead to a request for the deletion of paragraph 2 of draft article 20, since that paragraph introduced a derogation from the principle laid down in paragraph 1 and explained in what circumstances such a derogation could be exercised.

13. The United States had taken the view that the commentary to draft article 22 (State of destination of aliens subject to expulsion) "should note that an expelling State retains the right to deny an alien's request to be expelled to a particular State when the expelling State decides that sending the alien to the designated State is prejudicial to the expelling State's interests", on the grounds that this "important principle" was codified in their national legislation.[30] He personally was of the opinion that this proposal should not be accepted, since it would unacceptably hamper the expellee's freedom of movement and of choice of place of residence outside the territory of the expelling State in situations other than those where his or her extradition or transfer was ordered by a judicial authority.

14. The United States had proposed the deletion of paragraph 1 of draft article 23 (Obligation not to expel an alien to a State where his or her life or freedom would be threatened), on the grounds that the commentary provided no basis in national legislation, national case law, international case law or treaty law that would justify it.[31] He would simply draw attention to the legal arguments set out in his fifth report[32] should the explanations provided in the commentary prove insufficient.

15. As far as draft article 24 was concerned (Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment), the United States had criticized the expansion of the *non-refoulement* obligation found in the Convention against torture and other cruel, inhuman or degrading treatment or punishment, so as to prevent expulsion of aliens in danger of cruel, inhuman or degrading treatment or punishment, on two grounds: first, because the justification for that expansion was the case law of the European Court of Human Rights and a recommendation of the Committee on the Elimination of Racial Discrimination,[33] which they did not deem a sufficient

[22] *Ibid*., para. 4 of the observations of the United States on draft article 10.

[23] *Ibid*., para. 3 of the observations of the United States on draft article 13.

[24] *Yearbook … 2012*, vol. II (Part Two), p. 30 (commentary to draft article 13).

[25] See A/CN.4/669 and Add.1, observations of the United States on draft article 16.

[26] *Ibid*., para. 5 of the observations of the United States on draft article 19.

[27] *Ibid*., para. 1 of the observations of the United States on draft article 20.

[28] *Yearbook … 2012*, vol. II (Part Two), p. 35, para. (4) of the commentary to draft article 20.

[29] See A/CN.4/669 and Add.1, para. 3 of the observations of the United States on draft article 20.

[30] *Ibid*., para. 3 of the observations of the United States on draft article 22.

[31] *Ibid*., paras. 4 and 7 of the observations of the United States on draft article 23.

[32] *Yearbook … 2009*, vol. II (Part One), document A/CN.4/611.

[33] General Recommendation No. 30 (2004) on discrimination against non-citizens, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 18* (A/59/18), chap. VIII.

basis for presenting that draft article as codification of existing law, which meant that in fact it clearly reflected "an effort of progressive development"; and second, because that new *non-refoulement* obligation would not permit any exceptions or limitations.[34] The criticism of the basis of the rule contained in the draft article was hard to understand in light of the fact that the State itself recognized a basis in treaty and case law; by so doing the United States highlighted the solidity rather than the weakness of the basis. His own approach to the expulsion of aliens was in no way different to that of the Commission in its previous codification work. A State could disagree with a proposed rule without attempting to question one of the most classic approaches. Moreover, even if the draft article were no more than an effort of progressive development, that would still be within the Commission's terms of reference. It was astonishing that, in order to justify the need for exceptions to the blanket protection offered by that draft article, the State alleged that "cruel, inhuman or degrading treatment does not rise to the level of torture and is not treated equally under the [Convention against torture and other cruel, inhuman or degrading treatment or punishment]".[35] That position not only disregarded the fact that the title of the Convention implied that torture was above all cruel, inhuman or degrading treatment or punishment, it also ignored the definition of torture set forth in article 1 of the Convention; in that instrument there was no separate definition of cruel, inhuman or degrading treatment or punishment, nor were there discrete sets of rules—one for torture and the other for cruel, inhuman or degrading treatment or punishment. In that connection, it would also be instructive to refer to the findings of the European Court of Human Rights in *Selmouni* v. *France*.

16. As the six-month period stipulated in draft article 26 (Procedural rights of aliens subject to expulsion) appeared arbitrary to some States, he proposed to speak instead of a "brief duration", as suggested by the United States, and to explain in the commentary that this term normally meant a period of six months or less.

17. In response to a proposal from El Salvador, he intended to explain at the end of draft article 27 (Suspensive effect of an appeal against an expulsion decision) that the appeal referred to in that context had a suspensive effect on expulsion decisions "whose effects are potentially irreversible", to quote the terms used by the European Court of Human Rights in the judgment in *Čonka* v. *Belgium*.

18. The United States considered that draft article 29 (Readmission to the expelling State) might set a precedent and that a State must maintain its sovereign prerogative to determine which aliens might be allowed to enter its territory,[36] but those fears were unfounded, since the draft article contained an escape clause.

19. In conclusion, he said that the draft articles adopted on first reading rested on a balance between the right of a State to sovereignty over the admission and expulsion of aliens and the rights of the person subject to expulsion, a balance which it was eminently desirable to preserve. He hoped that the Commission would adopt the draft articles on second reading subject to the amendments which he intended to include, in particular in the commentary.

Protection of persons in the event of disasters (*continued*) (A/CN.4/666, Part II, sect. C, A/CN.4/668 and Add.1, A/CN.4/L.831)

[Agenda item 4]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

20. Mr. PARK approved of draft article 14 *bis* on the protection of relief personnel, equipment and goods, since that duty was a logical consequence of an affected State's consent to receive external assistance. In some extreme circumstances, however, the affected State might be unable to take all the necessary measures, in which case it should be exempt from responsibility under draft article 14 *bis*. It would be preferable to allow for greater flexibility by speaking not of "necessary measures" but rather of "all appropriate measures", the expression found in the Convention on the Safety of United Nations and Associated Personnel, or by employing the phrase "all means reasonably available to them", used by the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* [para. 430 of the judgment], or by stating that the State must take steps "to the extent it is able to do so", a phrase borrowed from the Convention on assistance in the case of a nuclear accident or radiological emergency (art. 8, para. 4). The purpose of the Commission's work was to draft a universal legal instrument containing minimum standards concerning States' rights and obligations in disaster situations; two States could commit themselves to a stricter obligation through a bilateral treaty, for example, by undertaking to adopt "all necessary measures".

21. Draft article 17 concerning the relationship with special rules of international law raised the issue of the hierarchy of successive treaties. In that respect, the Commission could choose either to establish a relationship between the current set of draft articles and other treaties or opt for the solution of giving precedence to treaties or other rules of international law with a more specific scope. For example, it could echo the terms of the ASEAN [Association of Southeast Asian Nations] Agreement on Disaster Management and Emergency Response cited in paragraph 62 of the report, or those of article 311, paragraph 2, of the United Nations Convention on the Law of the Sea.

22. In draft article 3 *bis* on the use of terms, in subparagraph (*a*) mention should be made of the environment, since it would be affected as much as persons and goods in the event of a disaster, and the phrase "or otherwise under the jurisdiction or control" should be added after "the State upon whose territory", as a State could, for example, need external assistance in its exclusive economic zone. He wondered whether it was necessary to define

[34] See A/CN.4/669 and Add.1, paras. 2 and 3 of the observations of the United States on draft article 24.

[35] *Ibid.*, para. 3.

[36] *Ibid.*, para. 1 of the observations of the United States on draft article 29.

"relevant non-governmental organization" and he proposed the addition of "subject to the direction and control of the affected State" at the end of the definition of "relief personnel" for the sake of greater clarity. Lastly, he was unsure whether "risk of disasters" also included risks related to climate change because, if that were the case, that definition might raise complex legal, political and economic questions.

23. Mr. NOLTE agreed that the duty to protect relief personnel, equipment and goods was an obligation of conduct and not of result and he therefore wondered whether it was wise that the text of draft article 14 *bis* established a strict obligation on the part of the affected State to "take all necessary measures". His suggestion was therefore to use the terminology of most universal and regional treaties and to say that the State "shall ensure" that protection, or to speak of "appropriate measures".

24. In draft article 17, it might be possible to go further and to state that the draft articles "may, if appropriate, be taken into account in the interpretation of special rules of international law". He took it that draft article 18 was supposed to allow room for the formulation of customary rules on disaster management and wondered what its relationship was with draft article 17.

25. In draft article 3 *bis*, the Commission should consider adding the phrase "under whose jurisdiction" to the definition of the affected State, in order to convey the idea that States could be affected by a disaster not only when they exercised their territorial sovereignty, but also when they exercised their jurisdiction over a given territory. In his opinion, the definition of equipment and goods should not be restricted to those which were "necessary" for the provision of disaster relief but, on the contrary, the phrase "and other objects at the disposal of the assisting States or other assisting actors for the purpose of the provision of disaster relief assistance" should be added to the end of the list. In the definition of "relevant non-governmental organization", the phrases "working impartially and with strictly humanitarian motives" and "because of its nature, location and expertise" should be deleted in order to prevent any abuse of the definition, and the commentary should make it clear that an affected State could revoke the right of an NGO to enter its territory if the organization was not working impartially. With regard to the definition of relief personnel, such persons did not need to be "specialized". He did not see the point of the phrase "having at their disposal the necessary equipment and goods". Lastly, he wondered whether the word "probability" was an apt definition of the risk of disasters.

26. Mr. FORTEAU supported draft article 14 *bis*, which reflected sufficiently solid practice, even though in some respects it merely restated something that had been set out in more general terms in draft article 9. While those two provisions certainly did not have the same field of application, or necessarily the same scope, they nevertheless overlapped substantially. It would therefore be necessary to explain, at least in the commentary, how they related to one another. The duty to protect, if indeed it existed, was certainly an obligation of conduct and not of result. In addition, the court decisions cited in paragraph 41 of the seventh report of the Special Rapporteur seemed to reflect the view that this duty was accompanied by a margin of appreciation which varied from one sphere to another. It was therefore necessary to provide some clarification in that respect, either in the body of draft article 14 *bis* or in the commentary thereto. In the subject matter under consideration, States must have an extensive margin of appreciation.

27. With regard to the actual content of the duty to protect, the Special Rapporteur had been right to opt for a precise definition of what was expected of the affected State, but he had failed to explain why he had confined his choice of adjective to "necessary" when in the practice and the case law to which he referred the measures to be taken were also qualified as "appropriate". In addition to the fact that this wording was ambiguous, that choice was inconsistent with draft article 16 concerning the duty to reduce the risk of disasters. The Special Rapporteur seemed to be suggesting that the conduct of relief personnel might in some situations exempt the affected State from its duty to protect. One question which arose was whether the State supplying the assistance was also bound by a duty of care towards its personnel, as paragraph 45 of the report seemed to suggest and, if so, how that duty tied in with the affected State's duty of care.

28. The wording of draft article 17 might lead to confusion. It should be aligned with that generally used by the Commission in its without prejudice clauses—for example, article 55 of the articles on responsibility of States for internationally wrongful acts.[37] Draft article 18 seemed to be superfluous: either it referred to treaty law and therefore duplicated draft article 17, or it referred to customary law, in which case it would surprising if the Commission, in an exercise of codifying and progressively developing general international law, were to state that its draft articles were incomplete and that other customary rules might exist elsewhere. Draft article 19 did not seem necessary either: first, since the principles mentioned by the Special Rapporteur had become part of customary law, and it was not simply because they were enshrined in the Charter of the United Nations that they should not apply at all times and, second, since some of those principles had already been incorporated in other draft articles.

29. Draft article 3 *bis* was useful and necessary and could contain other terms which were also worth defining, such as "person", or it could even include the definition of the term "disaster", which formed the subject of draft article 3. The definition set out in draft article 3 *bis*, subparagraph (*a*), should encompass a reference to the environment and the excessively restrictive criterion of "territory" should be replaced with "territorial control". Subparagraph (*d*) should refer to essential needs, as draft article 2 did. It was hard to see why the notion of goods indispensable for survival should be mentioned in subparagraph (*e*) when it did not appear in draft article 2. In subparagraph (*g*), the criterion of being engaged in the provision of disaster relief assistance "on behalf of an assisting State" required clarification, because it did not

[37] General Assembly resolution 56/83 of 12 December 2001, annex. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

in any way match the criteria for attribution of conduct applicable under the law of international responsibility. It would also be necessary to explain its link with the criterion of control stemming from draft article 9, or in any event to draw a clearer distinction between control over persons by the sending State or organization, and control over the relief operation by the affected State.

30. Mr. TLADI, noting that the Special Rapporteur justified the duty set forth in draft article 14 *bis* by reference to a number of treaties and instruments that imposed a similar duty, underscored the need also to take account of the various treaty contexts in which that duty was laid down. Treaties containing such a duty to protect were based on the understanding that there must be cooperation between the affected and the assisting State, where the unqualified consent of the former was the precondition of that duty. Even though the Special Rapporteur held that this was the approach taken in the draft articles, it was questionable whether that was really the case. Admittedly he mentioned the notions of consent, sovereignty and non-intervention, but it must not be forgotten that the Commission had decided, rightly or wrongly, not to rule out the possibility of overriding those principles in circumstances which were ill defined. Quite apart from the crucial question of who decided whether the affected State had arbitrarily refused assistance, or whether it had the capacity to respond to a disaster, in view of the inseparable link between consent and the duty mentioned in article 14 *bis*, it was worth asking whether it would be logical to impose a duty to protect relief personnel, equipment and goods when external assistance was given after consent had been withheld in what was deemed to be an arbitrary manner. As with other provisions, that example illustrated the futility of a rights-based approach as opposed to an approach based on cooperation, especially as the latter was consistent with international law and State practice.

31. While he was not against the referral of draft article 14 *bis* to the Drafting Committee, he would prefer the draft article to speak of "reasonable", "practical" or "appropriate" rather than "necessary" measures. He also supported the referral of draft article 17, but considered that draft articles 18 and 19 were superfluous.

32. Mr. PETRIČ was pleased that a balance had been kept between the sovereignty of a State affected by a disaster—from which its consent to assistance flowed—and the obligation to cooperate, meaning that the affected State could not refuse such assistance arbitrarily when it did not have the capacity to cope with a disaster. Although he supported the referral of all the proposed draft articles to the Drafting Committee, he considered that draft article 14 *bis* should be recast to make the duty it contained less rigid, that draft article 19 was not absolutely necessary and that a definition of "disaster prevention" could be added to draft article 3 *bis*.

Organization of the work of the session (*continued*)

[Agenda item 1]

33. The Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) consisted of: Mr. Kittichaisaree (Chairperson), Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Laraba, Mr. Murphy, Mr. Park, Mr. Šturma, Mr. Vázquez-Bermúdez and Mr. Tladi (*ex officio*).

34. The Planning Group consisted of: Mr. Murase (Chairperson), Mr. Caflisch, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood and Mr. Tladi (*ex officio*).

The meeting rose at 1.05 p.m.

3200th MEETING

Wednesday, 7 May 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti.

Protection of persons in the event of disasters (*continued*) (A/CN.4/666, Part II, sect. C, A/CN.4/668 and Add.1, A/CN.4/L.831)

[Agenda item 4]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the seventh report of the Special Rapporteur on the protection of persons in the event of disasters (A/CN.4/668 and Add.1).

2. Mr. MURPHY said that the issue of protection of relief personnel and their equipment and goods was not well anchored in national laws. Laws that dealt with disaster situations focused on the admission of personnel and goods and generally did not address their protection. Any protection available for disaster relief personnel and goods deployed from one State to another was embedded in relevant bilateral or multilateral international agreements. Accordingly, it made sense to look to international agreements and instruments for guidance, as the Special Rapporteur was doing.

3. Those instruments reflected a consistent belief that States receiving assistance in disaster-related operations in which foreign personnel were deployed were under an

obligation consisting of three elements: a legal obligation to ensure protection, or at least to take reasonable steps to protect; the imposition of that obligation upon the State receiving the assistance; and the inclusion of both personnel and their goods and equipment within the scope of the obligation. There appeared to be no significant contrary practice in which States receiving assistance denied any responsibility to take appropriate measures for the protection of personnel or goods. In his view, the obligation had thus passed into customary international law. Draft article 14 was the logical place to capture it.

4. The question arose, however, as to whether the exact text of the proposed draft article 14 *bis* accurately expressed the obligation. The wording of the article—"[t]he affected State shall take all necessary measures to ensure the protection of relief personnel, equipment and goods"—was rather strong and might be viewed as imposing an obligation of result. Consequently, a failure by a State to take the measures necessary to ensure the required protection would constitute a violation of the obligation.

5. However, it was clear from the Special Rapporteur's seventh report that two types of obligations were at issue: an obligation of result and an obligation of conduct. For matters directly under its control, the affected State was under an obligation of result, requiring it, for example, to prevent its own organs from being directly involved in detrimental activities with regard to relief personnel. By contrast, with respect to the activities of non-State actors, the affected State was under an obligation of conduct, which only required it to undertake due diligence in endeavouring to guarantee protection.

6. The distinction was borne out to a certain extent by treaty practice. Treaties that addressed situations when the conduct of the receiving State itself posed the major risk to foreign personnel formulated the obligation as one of result: the State must ensure protection. By contrast, treaties dealing with disaster situations in which such risks came from non-State actors adopted a more cautious approach, only requiring States, for example, to make their best efforts to provide protection.

7. However, the distinction between obligations of result and of conduct was not reflected in the proposed draft article 14 *bis*. The proposed language—an obligation to "take all necessary measures to ensure the protection of relief personnel"—could be construed as an obligation of result, whereas he believed the Special Rapporteur had intended to blend obligations of result and conduct. In order to avoid ambiguity, the draft article could be reworded to contain two different standards: one imposing an obligation of result with respect to the affected State's own treatment of relief personnel and equipment, and the other imposing an obligation of conduct with respect to risks from non-State actors. The current wording of draft article 14 *bis* might suffice for the former, while one of the formulations proposed by Mr. Park might be appropriate for the latter.

8. With respect to draft articles 17, 18 and 19, he agreed with Mr. Murase that consideration should be given to collapsing them into a single article, since they overlapped.

9. If one assumed that the draft articles would not ultimately become a treaty, then draft article 17 would probably not be necessary, since even if some or all of the draft articles were found to be customary international law, States could conclude treaties that would have precedence. However, if one assumed that the draft articles would become a treaty and one wanted prior agreements to prevail over the new rules to be contained therein, then draft article 17 should be retained. The Drafting Committee might then consider replacing the words "special rules of international law" with "treaties" in order to avoid overlap with draft article 18.

10. As to draft article 18, he would insert the word "customary" before "international law" in order to make clear that the draft articles did not, as *lex specialis*, wholly displace other rules in customary international law. Draft article 19 seemed unnecessary, given that the Charter of the United Nations trumped customary law and other conflicting treaties.

11. Draft articles 3 *bis*, 14 *bis*, 17, 18 and 19 should all be referred to the Drafting Committee.

12. Mr. AL-MARRI said that the domestic legal order of the affected State must enable the provision of international assistance in situations of disaster, but more importantly, measures should be taken to ensure the safety and security of humanitarian personnel deployed in the territory of that State throughout the relief operation.

13. The host State's consent was required for the provision of external assistance. Such a requirement was contained in various instruments defining the legal framework of international assistance and relief operations in affected States, which comprised the obligation of non-State actors to seek the affected State's consent to receive assistance; the role of that State in coordinating assistance efforts with relief actors; and its duty to protect relief personnel and their equipment and goods. In that regard, the Special Rapporteur had distinguished between an obligation of result and an obligation of conduct. A duty to protect could be equated with a commitment to act. Beyond its efforts to protect relief personnel, their equipment and goods, therefore, a State was required to prosecute the perpetrators of illegal acts.

14. Generally speaking, the draft articles should reflect the pertinent norms contained in international instruments in order to avoid any discrepancy. Similarly, they should echo the norms of customary international law.

15. The seventh report was characterized by clarity, balance and inclusiveness. The proposed new draft articles were acceptable and were compatible with all the draft articles already adopted by the Commission.

16. Mr. HMOUD said that, on the whole, he endorsed the new draft articles proposed by the Special Rapporteur and recommended sending them to the Drafting Committee.

17. Regarding draft article 14 *bis*, he said that the capacity to conduct relief operations was significantly hampered if the safety of relief personnel, equipment and

goods was at risk. Hence the need for the draft articles to provide sufficient legal protection for the latter without placing an undue burden on the affected State during situations of vulnerability, when its capacity to assume legal responsibilities might be undermined. He agreed with the Special Rapporteur that the affected State's obligation in that context was one of conduct, not of result. That obligation was centred on the positive measures that the affected State had to take to prevent attacks on and mitigate risks to the safety and security of relief workers, including any risks that might result from acts by the State's own organs or agents.

18. However, the proposition set out in paragraph 36 of the seventh report of the Special Rapporteur went beyond such safety and security measures, suggesting that affected States should extend immunity from their jurisdiction to relief personnel. That had no basis in general international law, and several of the instruments cited in the report made it clear that the duty of protection was distinct from the issue of immunity. It was therefore important to clarify in the commentary to draft article 14 *bis* that its scope was confined to measures designed to ensure the safety and security of relief personnel and their equipment and goods and did not extend to immunity. The affected State and relief actors involved must be left to resolve the question of immunity in their bilateral and multilateral agreements. That would be consistent with the premise of the entire set of draft articles, which created a well-crafted balance between the rights and obligations of the various actors.

19. He agreed with the Special Rapporteur that the goal of draft article 14 *bis* was to create an obligation of conduct, giving the affected State a margin of appreciation in deciding which measures needed to be adopted to ensure the safety of relief workers, as long as it exercised due diligence in difficult and unpredictable circumstances. The wording of the text should reflect those considerations.

20. Turning to the other new draft articles, he agreed that the special rules in bilateral and multilateral instruments should prevail over any general rule in the draft articles that was inconsistent with them. Draft article 17 merely expressed that general rule on *lex specialis*, however, and he was therefore flexible about its inclusion. Draft article 18 appeared useful in that it indicated that the rules contained in the draft articles were intended to be binding and general in nature. While not strictly necessary, draft article 19 might have positive policy consequences regarding the primacy of the legal principles contained in the Charter of the United Nations.

21. With respect to article 3 *bis*, the definition of "affected State" should include not only the State's territory but also the territory under its control. That was especially pertinent since the protection offered under other legal regimes might not be sufficient during a disaster situation.

22. Mr. WISNUMURTI said that he supported the inclusion of draft article 14 *bis* in the set of draft articles, but thought that its wording should be less prescriptive, in order to more adequately reflect the principle that the obligation to protect relief personnel, equipment and goods was an obligation of conduct, not of result. One way to accomplish that would be to replace the words "necessary measures" with "appropriate measures". A more detailed description of the nature of that obligation could then be included in the commentary to the draft article.

23. He shared the Special Rapporteur's view that, in order to minimize the security risks for relief personnel, the affected State should be required to show due diligence by taking the necessary preventive measures. Similarly, before sending relief personnel to the affected State, the assisting State should take measures to reduce any danger that such personnel might take advantage of the chaos caused by the disaster to engage in unlawful activities that were detrimental to the security interests of the affected State.

24. He concurred with the Special Rapporteur that the manner in which draft article 17 was currently worded was to be preferred to a "without prejudice" clause. Draft article 18 was essential for further clarifying the scope of the draft articles and supplementing them, and draft article 19 was an important umbrella provision aimed at ensuring that the draft articles did not undermine the basic principles embodied in the Charter of the United Nations. With those comments and suggestions, he was in favour of referring all five draft articles to the Drafting Committee.

25. Ms. ESCOBAR HERNÁNDEZ suggested that, given the close relationship between draft article 14 on facilitation of external assistance and the proposed draft article 14 *bis*, they might be recast as two paragraphs of a single article. That would have the advantage of providing a full view of the obligations imposed on the affected State regarding the provision of external assistance in its territory. She fully endorsed the notion that the obligation enunciated in draft article 14 *bis* was one of conduct; however, that did not preclude taking into consideration its clearly results-based aspect, which was to ensure the protection of relief personnel, equipment and goods. Lastly, for the wording of the draft article, she shared the preference expressed by other members of the Commission for the expression "appropriate measures" over that of "necessary measures".

26. Draft articles 17, 18 and 19 were all aimed at defining the relationship between the draft articles and other international rules that might be applicable to disasters and the protection of persons in the event of disasters. Although the Special Rapporteur had made a laudable attempt to catalogue all the permutations of that relationship, with a formulation for each, she was not sure that such an endeavour was either desirable or necessary. In her view, draft article 19 was superfluous; the primacy of the obligations arising from the Charter of the United Nations was achieved through the direct application of Article 103 of the Charter, and did not depend on the establishment of additional rules of international law. Moreover, in view of the Commission's status as an organ of the United Nations, any reference to the compatibility of the Charter of the United Nations with draft articles elaborated by the Commission was totally unnecessary.

27. It was unclear why proposed draft articles 17 and 18 had been based on separate models, and the Special Rapporteur's arguments to support that choice were not entirely convincing. The distinction between the two contingencies described in those texts would have been

justified had each referred to a different category of rules, such as rules of customary and treaty-based law, but that did not seem to be the case. She therefore did not see the utility of including draft article 18 in the project. Perhaps the Drafting Committee might find language that could cover both contingencies in a single article, whose focus would primarily be that of draft article 17, or else resolve the Special Rapporteur's concern by means of a reference in the commentary to draft article 17. Subject to that suggestion, she was not opposed to referring all three draft articles to the Drafting Committee, if that was the consensus of the majority of the members of the Commission.

28. Generally speaking, she shared the Special Rapporteur's views with regard to draft article 3 *bis* but had several comments to make. First, with regard to the definition of "affected State", she proposed that a reference to the territory under the State's jurisdiction or territory under its jurisdiction or control be inserted [*territorio sometido a su jurisdicción* or *territorio sometido a su jurisdicción o control*]. The stated objective of the draft articles fully confirmed that they referred to all the territories that might be under the jurisdiction or control of the affected State, which might not be limited exclusively to its territory itself.

29. Second, there was a contradiction in draft article 3 *bis*, subparagraphs (*c*) and (*f*), between the meaning ascribed to the phrase "any other entity or person" in the first instance and to "private and corporate entities" in the second. In subparagraph (*c*), the implication was that the subjects in question were distinct from NGOs, whereas in the second instance, they were given as an example of a relevant NGO. Although the Special Rapporteur explained the reasons for referring to those entities differently in each case, she did not find his arguments to be sufficiently persuasive. If the objective was to include any private entity that provided disaster relief assistance, irrespective of the way that this entity had been set up, then it was sufficient to use the term "non-governmental organization" without further addition or qualification. Moreover, subparagraph (*f*) added nothing new to the generic concept of non-governmental organization that was already defined in subparagraph (*c*). On the contrary, the addition of the adjective "relevant" seemed risky and not very useful, given the variety of NGOs that participated in the system of disaster relief assistance, not to mention the practical problems that could arise when attempting to determine whether a particular NGO was "relevant". Perhaps the concerns that had prompted the Special Rapporteur to include that definition in the draft article and to draw a distinction between subparagraphs (*c*) and (*f*) might be resolved in the commentary to draft article 3 *bis*.

30. Third, she agreed with the view that draft article 3 and draft article 3 *bis* should be recast as a single article. Maintaining draft article 3 as a separate provision was justified only if it was intended to define the scope of application of the draft articles; however, that did not appear to be the Special Rapporteur's aim. Thus, if the Commission was going to adopt a general article on the use of terms, as was proposed in draft article 3 *bis*, the definition of "disaster" should be included with the other definitions and, given its importance, it should be placed at the top of the list.

31. Mr. ŠTURMA said he agreed with the Special Rapporteur that the obligation of protection was an obligation of conduct. As a result, he would prefer the obligation imposed on the affected State to be for it to take "all appropriate measures" rather than "all necessary measures". That said, the difference between obligations of conduct and obligations of result referred to by Mr. Murphy was worth taking up in the Drafting Committee. He recommended referring draft article 14 *bis* to the Drafting Committee.

32. With regard to the general provisions contained in draft articles 17, 18 and 19, he did not find it necessary to have two separate provisions, one on *lex specialis* (art. 17) and the other on other applicable rules of international law (art. 18). While the first was fully justified and well supported by examples of treaty practice, the second seemed superfluous and unclear. Although similar provisions had been included in article 56 of the articles on responsibility of States for internationally wrongful acts,[38] the two situations were actually quite different: State responsibility represented a large corpus of customary norms of international law, whereas the present topic relied mostly on treaty law and soft-law instruments, thus, to a large extent, involving the progressive development of international law. The outcome of the Commission's work on the topic should preferably be a framework convention that included general rules.

33. As to draft article 19, even though it might seem unnecessary to include an express reminder that the draft articles were without prejudice to the Charter of the United Nations, he was nevertheless in favour of retaining it. Despite the fact that, in most cases, the protection of persons and disaster response operated on the basis of a voluntary offer of external assistance and its acceptance by the affected State, that legal framework could change radically. For example, a disaster might be of such magnitude that the Security Council adopted a binding resolution on an international operation to provide humanitarian assistance to its victims. In such a case, the Security Council resolution would take precedence over the general rules contained in the draft articles and even over special bilateral or multilateral agreements. He was consequently in favour of referring draft articles 17 and 19 to the Drafting Committee.

34. He would also recommend referring draft article 3 *bis* to the Drafting Committee, and was convinced that it would benefit from several drafting improvements, such as the insertion in subparagraph (*a*) of the words "or under whose jurisdiction" and "environment".

35. Mr. TLADI suggested that the legal situation outlined by Mr. Šturma would prevail, even without the inclusion of the draft article 19 in the draft articles: under Article 103 of the Charter of the United Nations, a Security Council resolution of the kind just described would always override the draft articles, would it not?

[38] General Assembly resolution 56/83 of 12 December 2001, annex. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq*., paras. 76–77.

36. Mr. ŠTURMA said that he considered draft article 19 to be useful but not essential. He agreed that the legal value of the obligations arising from the Charter of the United Nations would be the same, irrespective of whether an express provision such as the one in draft article 19 was included in the draft articles.

37. Mr. HASSOUNA said that a separate provision on the protection of relief personnel, equipment and goods, such as that proposed in draft article 14 *bis*, was an apt addition to the draft articles and was in keeping with the main universal and regional treaties that dealt with disasters. Although the Special Rapporteur had explained in his seventh report that the measures adopted by the affected State to provide such protection might differ in content, the language of the proposed text itself was rather terse, providing merely that the affected State "shall take all necessary measures". He agreed with the proposal to replace the term "necessary measures" with "appropriate measures" and proposed that a clear indication as to what sorts of measures were meant should be included in the commentary. He further proposed to indicate explicitly in the draft article that the affected State must have consented to the presence of any relief personnel, equipment and goods that were in its territory.

38. The question of whether and under what circumstances the protection of relief personnel should be reserved to the military and police forces of the affected State could benefit from further elaboration in the commentary or even in the draft article itself. In addition, draft article 14 *bis* should indicate that the necessary measures were related to security concerns, while leaving it to the commentary to explain the context. The Special Rapporteur's point that international humanitarian actors could help to mitigate security risks by taking steps to reduce their own vulnerability might also be highlighted in the commentary.

39. The affected State's international obligation to "ensure the protection" of relief organizations under article 14 *bis* should be limited by the State's capacity during the disaster. In some major disaster situations, the State's ability to meet its basic obligations towards its citizens was questionable at best. Although the report used flexible language, suggesting that "best efforts" and "cooperation" were at the centre of the obligations in article 14 *bis*, the wording overall seemed to create a more mandatory framework.

40. In his seventh report, the Special Rapporteur did not resolve the problem of unwillingness or inability on the part of the sending State to ensure the protection of the aid it provided. In such a case, it might have to negotiate a bilateral agreement with the affected State or despatch aid through a neutral organization like the United Nations, for example.

41. Since draft articles 17 and 18 dealt with closely related matters, they could be merged. In addition, draft article 18 should specify which were the "applicable rules": rules of general international law or other sources of international law, such as custom.

42. He questioned the need for a separate provision like draft article 19, although he recognized that it would strengthen the leading role of the United Nations in disaster management. The fact that obligations under the Charter of the United Nations took precedence over others was universally recognized. However, if the draft articles were subsequently adopted in the form of a convention, a reference to the Charter might be included in the preamble.

43. The methodology used for establishing the definitions in draft article 3 *bis* was commendable, but he shared the view that, in subparagraph (*a*), a reference to the environment should be added and the term "territory" should be defined as the territory under the effective jurisdiction of the State. The criterion of effective jurisdiction, rather than mere territory, defined the obligation of a State towards individuals, as recognized in the case law and in paragraph 89 of the report. While he understood the Special Rapporteur's wish to avoid a debate on extraterritorial jurisdiction, which was more the exception than the rule, he considered it advisable to make the scope of the State's obligations as comprehensive and clear as possible. Subparagraph (*f*), containing the definition of "relevant non-governmental organization", raised some difficult issues and needed to be refined, and some other terms frequently used throughout the draft articles, such as "victims of a disaster", could be added to the list of definitions. In conclusion, he supported the referral of all the draft articles to the Drafting Committee.

44. Mr. SABOIA said that in his seventh report, the Special Rapporteur had given convincing factual examples and legal precedents for the need to have a separate provision on protection of relief personnel, equipment and goods from the security risks to which they might be exposed in the aftermath of serious calamities. He endorsed the comment made earlier that only those States and non-State actors that had actually received the consent of the affected State to their presence in its territory were entitled to such protection. He also endorsed the suggestion to replace "all necessary measures", with "all appropriate measures", a more flexible formulation. However, it was difficult and perhaps unnecessary to draw a distinction between what constituted an obligation of conduct and what constituted an obligation of result. In paragraph 36 of his seventh report, the Special Rapporteur referred to the negative obligations assumed by the affected State with regard to the conduct of its own agents, as opposed to the positive obligations applicable to the control of other agents. He understood the former to be stricter and subject to a higher threshold of diligence than the latter. Ultimately, however, what mattered most was the circumstances on the ground and the ability and willingness of the affected State to exercise its authority.

45. Articles 17 to 19 could be referred to the Drafting Committee. The same applied to draft article 3 *bis*. Like other members, he was in favour of including a reference to the territory over which the State exercised jurisdiction, to make the text more comprehensive and more in line with other instruments on the protection of the human person.

46. Mr. EL-MURTADI SULEIMAN GOUIDER observed that much of the debate had focused on draft article 14 *bis* and how to define an obligation of conduct as opposed to an obligation of result. He had no particular difficulty with the wording of draft article 17,

which reflected the wording used in the articles on diplomatic protection.[39] He saw no need for further discussion on draft article 19, as the primacy of the obligations under the Charter of the United Nations over obligations under other international agreements was self-evident. The terminology issue raised in connection with draft article 3 *bis* should be dealt with in the Drafting Committee. In conclusion, he was in favour of the referral of all the draft articles to the Drafting Committee.

47. Mr. CANDIOTI said that the Commission was about to conclude its work on a very topical subject, as borne out by a recent United States Government report on the proliferation of natural disasters caused by climate change. He agreed on the need for draft article 14 *bis* and welcomed Mr. Murase's comment on the importance of a distinction between military and civilian personnel and Mr. Murphy's remark on the characteristics of State compared with non-State agents. As to the wording of draft article 14 *bis*, the proposal to replace "all necessary measures" with "all appropriate measures" would afford greater flexibility and should be taken up in the Drafting Committee, which should also consider the question of qualifying the term "territory".

48. He shared the view that, since they were general provisions, articles 17 to 19 were not necessary but useful. If they were included in the text, he would prefer them to appear as separate articles.

49. Draft article 3 *bis* was essential but required further work by the Drafting Committee. Under the current topic, the term "person" referred exclusively to human beings, whereas in the area of diplomatic protection there was a distinction between natural and legal persons; perhaps that point could be clarified in the commentary. Furthermore, since there would eventually be more than 20 draft articles, the Drafting Committee might wish to reorganize them and consider the possibility of drafting a preamble to provide greater clarity.

50. Mr. SINGH said that, in principle, he supported the inclusion of draft article 14 *bis*. In his seventh report, the Special Rapporteur described in detail the legal basis for the duty of the affected State to protect the personnel, equipment and goods of the assisting State or entity. The draft articles adopted so far recognized a basic tenet of humanitarian assistance: that external assistance during a disaster situation took place with the consent of the affected State, which also had the primary role in the control, supervision and coordination of relief activities. Paragraph 32 of the report stated that once the affected State had accepted the offers of assistance submitted by relevant external actors, it should endeavour to guarantee the protection of the relief personnel, equipment and goods involved. He endorsed the statement in paragraph 38 of the report that the duty to protect relief personnel, their goods and equipment was an obligation of conduct and not of result, requiring States to act in a reasonably cautious and diligent manner to guarantee protection by attempting to avoid harmful events.

[39] General Assembly resolution 62/67 of 6 December 2007, annex. See the draft articles on diplomatic protection adopted by the Commission at its fifty-eighth session and the commentaries thereto in *Yearbook … 2006*, vol. II (Part Two), pp. 24 *et seq*., paras. 49–50.

51. He was in favour of the referral of draft article 14 *bis* to the Drafting Committee, subject to the review of the "all necessary measures" clause. He expressed support for draft article 17 and its referral to the Drafting Committee and endorsed Mr. Murase's suggestion to merge it with draft articles 18 and 19. Lastly, he agreed that draft article 3 *bis* should also be referred to the Drafting Committee.

52. Mr. KITTICHAISAREE said that the draft articles contained in the seventh report must be understood in light of the draft articles provisionally adopted thus far, especially with respect to sovereignty and the consent of the affected State. He endorsed the views expressed by Mr. Park on draft articles 17 and 18 and shared the doubts of Mr. Hassouna and other members about the need for draft article 19.

Organization of the work of the session (*continued*)

[Agenda item 1]

53. Mr. SABOIA (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of protection of persons in the event of disasters was composed of Mr. Forteau, Mr. Hmoud, Mr. Kittichaisaree, Ms. Jacobsson, Mr. Murase, Mr. Murphy, Mr. Park, Mr. Petrič, Mr. Singh, Mr. Vázquez-Bermúdez and Sir Michael Wood, together with Mr. Valencia-Ospina (Special Rapporteur) and Mr. Tladi (Rapporteur), *ex officio*.

The meeting rose at 12.55 p.m.

3201st MEETING

Thursday, 8 May 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Al-Marri, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti.

Protection of persons in the event of disasters (*continued*) (A/CN.4/666, Part II, sect. C, A/CN.4/668 and Add.1, A/CN.4/L.831)

[Agenda item 4]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the seventh report of the Special Rapporteur on the protection of persons in the event of disasters (A/CN.4/668 and Add.1).

2. Mr. VÁZQUEZ-BERMÚDEZ said that the obligations covered by draft articles 14 and 14 *bis* did not overlap with each other. Nonetheless, the obligation provided for in the latter was an obligation of conduct and, in order not to impose a disproportionate burden on an affected State, when it was already in a difficult situation, it would be preferable to request it to take, not "all necessary measures", but rather "appropriate measures" at its disposal.

3. In order to define the relationship between the draft articles and the special rules of international law that dealt with similar matters (draft article 17), it would be preferable, as Mr. Forteau had suggested, to choose a simpler expression establishing the primacy of *lex specialis*. Draft article 18 was not essential because the scope of the draft articles was well defined in article 1. Draft article 19 was not necessary either, since Article 103 of the Charter of the United Nations was applicable without the need for a reference thereto. The proposal to draft a preamble warranted consideration.

4. In draft article 3 *bis*, reference should be made to territories under control, since if a disaster took place at sea or in a place such as Antarctica, for example, there would be no affected State. Furthermore, the definition should mention the environment, which could also be affected by disasters.

5. Mr. KAMTO said he also considered that the phrase "all necessary measures" in draft article 14 *bis* was maximalist and risked confining the affected State to a strict obligation that it would not always be able to fulfil. In certain cases, some measures might be deemed necessary but were not available to or at the disposal of the affected State.

6. Draft article 17, which indicated that the draft articles set forth dispositive norms that would be applicable when the required norms were not provided for under international law or *lex specialis*, clearly limited the scope, which was useful. Draft article 18, which explained that the draft articles did not establish a comprehensive regime with regard to the protection of persons in the event of disasters, should also be retained. On the other hand, draft article 19, gave rise to ambiguity by needlessly explaining that the draft articles were "without prejudice to the Charter of the United Nations", when Article 103 of the Charter of the United Nations already addressed the hierarchy issue; stating that fact could imply that it might be otherwise. Finally, the definitions contained in draft article 3 *bis*, even though they needed to be refined, were very useful.

7. Mr. CANDIOTI said that referring to "appropriate measures" would not resolve the problem that an affected State might be unable to take those measures. Moreover, it raised the issue of the degree of State responsibility in the event of non-fulfilment of the obligation to protect. Perhaps reference could be made instead to "measures at the disposal of the affected State taking into account the specific situation".

8. Mr. FORTEAU observed that, in many respects, the debate was conditioned by choices already made by the Commission concerning draft article 16, where the commentary indicated that the phrase "necessary and appropriate measures" was intended to reflect the obligation of due diligence and the different ways in which States could give effect to that obligation.[40]

9. Mr. MURPHY said that there were other differences in terminology between the two draft articles, such as the use of the verb "ensure" in draft article 14 *bis*, which emphasized the strict nature of the obligation. A more maximalist approach should be adopted with regard to the instructions that a State could give its police forces to protect relief personnel, whereas a more flexible formulation would be preferable with respect to States' expected capacity to ensure protection against acts by non-State actors.

10. Mr. NOLTE said that the verb "ensure" was used in all the treaties cited by the Special Rapporteur and that, together with "appropriate measures", it did not emphasize the strict nature of the obligation.

11. Mr. PETER said that the issue was knowing how far to go in terms of the protection of relief personnel, in other words, the scope of the duty of the affected State. As noted by other members, the phrase "necessary measures" was rather strong and commanding. Instead of replacing it, it was necessary to clarify its meaning in draft article 14, according to which an affected State should take the necessary measures "within its national law". In draft article 14 *bis*, one could refer to "all necessary measures" to take "in the circumstances of the disaster involved and its impact" or "within its means and capacity". That would take into account the fact that different types of disasters called for different measures and that States had different capacities.

12. With regard to the definition of a "relevant non-governmental organization" in draft article 3 *bis*, he noted that, in the confusion of a disaster situation, it was difficult to assess the impartiality and motives of NGOs, never mind the fact that it was hardly a priority at that time. Furthermore, it was important not be too prescriptive as to the nature, location or expertise of those considered capable of providing assistance. Finally, he questioned the usefulness of referring to "special rules of international law" in draft article 17.

13. Mr. MURPHY, noting that several members had said that they were in favour of including the words "or otherwise under the jurisdiction or control" after "territory" in draft article 3 *bis*, subparagraph (*a*), asked what those notions covered, even if it seemed at first glance that the objective was not to cover territories occupied following an armed conflict because that was already mentioned in draft article 4.

14. Mr. HMOUD noted that the aim of draft article 4 was not to create an exception for occupied territories, but to fill in possible gaps where the rules of international humanitarian law were not applicable.

15. Mr. NOLTE recalled that he had been the first to raise that matter. His idea had been to draw attention to

[40] *Yearbook … 2013*, vol. II (Part Two), p. 61, paras. (9) and (11) of the commentary to draft article 16.

cases where the territory of a sovereign State affected by a disaster was not under that State's control but under that of a third State, whether following an occupation linked to armed conflict or by virtue of a treaty. It was important to cover those scenarios and to know which State was bound by the obligation set out in article 14 *bis*.

16. Mr. FORTEAU emphasized that the commentary to draft article 4 was very clear in that regard, since it stated that, while the purpose of the draft articles was not to regulate the consequences of armed conflict, they could nonetheless apply in cases where the rules of international law in force, in particular the rules of international humanitarian law, were not applicable.[41]

17. Ms. ESCOBAR HERNÁNDEZ said she shared that view, since a major catastrophe occurring within the context of armed conflict could not be ruled out. The cases in which international humanitarian law or the draft articles were applicable should nonetheless be clearly indicated. The concept of "jurisdiction" was a good solution, since it would allow all scenarios to be covered without any need to question the legitimacy of its exercise, while giving the draft article the broadest possible scope, even though, as emphasized by Mr. Nolte, it would be better not to illustrate the concept using examples, in order to avoid a political debate.

18. Mr. FORTEAU said that the issue raised by Mr. Murphy might pose a more general problem since, as a result of draft article 9, paragraph 1, the affected State was obliged, by virtue of its sovereignty, to ensure the protection of persons on its territory. If the concept of territory covered territorial control, and not only territorial sovereignty, there would a problem between that paragraph and draft article 3 *bis* that would need to be resolved at an appropriate moment.

19. Mr. KITTICHAISAREE said that, in that regard, it was also important to take into consideration the case where a disaster occurred on the territory of a State beset by an armed conflict whose existence, for one reason or another, was not recognized by that State. The Commission should therefore reflect on how to treat situations where it was unclear whether the rules of international humanitarian law were applicable and consider drafting a proposal providing that in such a case, at the very least, international human rights law was applicable.

20. Mr. VALENCIA-OSPINA (Special Rapporteur) suggested, in view of the comments and concerns expressed, which would be duly reflected in the commentaries, that the plenary meeting refer to the Drafting Committee the five proposed draft articles, as requested by the overwhelming majority of members. In order to conclude the debate, he wished to briefly restate the arguments given in support of each draft article.

21. With regard to draft article 14 *bis*, unanimously supported by the members, the question had been raised as to whether it was logical to impose the duty of protection on an affected State when external assistance was provided following withholding of consent that was deemed arbitrary. That question implied reopening the debate on a text that had already been adopted on first reading. He considered it appropriate to draw attention to Security Council resolution 2139 (2014) of 22 February 2014, in which the Security Council recalled "that arbitrary denial of humanitarian access and depriving civilians of objects indispensable to their survival, including wilfully impeding relief supply and access, can constitute a violation of international humanitarian law". In order to respond to the concerns of certain members (tenth paragraph of the preamble), he deemed it opportune to replace the adjective "necessary" with "appropriate". Regarding the extent of the obligation and the circumstances to be taken into account in order to define the measures to be taken in that regard, reference could be made to the behaviour of relief personnel—as already emphasized in the seventh report—or other circumstances, in order to determine the margin of appreciation granted to States; listing specific measures did not seem to be appropriate. With regard to mitigation measures to be adopted by humanitarian actors themselves, it was sufficient to mention them in the commentary, since they digressed too far from the scope of the draft articles. The relationship between draft articles 9 and 14 *bis* could be further clarified in the commentary by reflecting the position expressed in paragraph 30 of the report.

22. Regarding the proposal to split draft article 14 *bis* into two separate provisions according to the purpose of the obligation in question, it would be sufficient to draw a clear distinction in the commentary between situations in which State bodies were directly responsible for acts of violence against humanitarian actors and those in which the failure to adopt preventive measures could lead to a violation by the affected State of its obligation of conduct. In addition, both scenarios would be covered if reference was made to "appropriate" measures.

23. At the current stage, it was preferable not to merge draft articles 14 and 14 *bis*, whose provisions had a different approach and purpose. As to the relevance of human rights to draft article 14 *bis*, insofar as the protection of relief personnel could enhance the human rights of victims of disasters by enabling them to receive humanitarian assistance, there was clearly a valid policy and legal argument, which was already in the report. The commentary could mention that in order to justify the inclusion of draft article 14 *bis*.

24. With regard to the need to draw a distinction between the protection of the people of the affected State against harmful acts that could be committed by relief personnel, the Commission had already considered the matter in a different context, that of draft articles 7 (Human dignity) and 8 (Human rights) which clearly already responded to the concerns expressed, since they implied standards of behaviour for humanitarian actors aimed at preventing their activities from harming the local population. Furthermore, it was largely a matter of the "common" repression by States of harmful activities carried out on their territory. Even if relief personnel were accorded privileges and immunity, they were obliged to comply with the national law of the affected State. The commentary could mention that point and refer to draft articles 7 and 8.

[41] *Yearbook … 2010*, vol. II (Part Two), p. 188, para. (3) of the commentary to draft article 4.

25. Concerning the necessity to distinguish between civilian and military personnel in draft article 14 *bis*, he said that the distinction had no legal basis. Regarding the use of armed escorts to provide security services, he drew the Commission's attention to basic best practices on the use of armed escorts to protect humanitarian actors, which were among the main documents drafted by the Inter-Agency Standing Committee (IASC).[42] Those documents should be mentioned in the commentary to avoid any "militarization" of humanitarian assistance, since otherwise draft article 14 *bis* might induce States to attribute too much importance to matters of security, thereby creating additional hurdles for humanitarian personnel.

26. With respect to the need for the States concerned to prepare a status-of-forces agreement in the pre-disaster phase to regulate the "relief activities conducted by military personnel in the event of disaster" and the proposal for a new article 14 *ter*, he pointed out that it was hardly valuable to focus solely on military personnel, who often played only a marginal role in relief operations, and that the Commission had already rejected the idea of drafting a model agreement in 2012. The commentary could nonetheless encourage States to conclude such agreements.

27. Regarding the proposal to merge draft articles 17, 18 and 19, he said that aside from the fact that the first two addressed different legal problems, the provisions of the draft articles served different interests and that it would be preferable to keep them separate. It would also be preferable not to depart from the usual practice of the Commission, which had thus far addressed such final provisions in separate articles.

28. The preference stated by one member for inserting a "without prejudice" clause in draft article 17 had received scarcely any support and it would be preferable to maintain the text in its current form. Regarding the utility of draft article 18, he noted that certain examples given in paragraph 77 of the report, particularly the rules on the responsibility of both international organizations and States and certain provisions on the law of treaties, were good illustrations of rules of international law that might apply. Furthermore, he drew attention to article 23 of the Treaty on the Functioning of the European Union addressing consular assistance and the decision of the European Council 95/553/EC,[43] which provided for consular assistance, including repatriation of "distressed" citizens of the European Union (art. 5, para. 1 (*e*)).

29. Draft article 19 was an umbrella clause that was found in other texts previously adopted by the Commission. Nevertheless, given that certain members had questioned its relevance, it would be advisable for the Drafting Committee to look into the matter. Finally, with regard to draft article 3 *bis*, the different comments and proposals by members would be taken up by the Drafting Committee.

30. The CHAIRPERSON said he took it that the Commission wished to refer draft articles 3 *bis*, 14 *bis*, 17, 18 and 19 to the Drafting Committee, taking into account the comments made during discussion.

It was so decided.

Expulsion of aliens (*continued*)* (A/CN.4/669 and Add.1, A/CN.4/670, A/CN.4/L.832)

[Agenda item 2]

Ninth report of the Special Rapporteur (*continued*)*

31. The CHAIRPERSON invited the members of the Commission to comment on the Special Rapporteur's ninth report on expulsion of aliens (A/CN.4/670).

32. Mr. NOLTE congratulated the Special Rapporteur on his ninth and probably last report on the topic of expulsion of aliens. In that report, the Special Rapporteur examined, with his usual lucidity, the observations and comments made by Governments on the draft articles that had been provisionally adopted and on the commentaries thereto (A/CN.4/669 and Add.1). A significant number of States' observations and comments forcefully challenged the current version of the draft articles. In his view, the numerous specific proposals and observations made by Governments should be debated in the Drafting Committee, not by the Commission in plenary meetings.

33. The Commission should continue to call the outcome of its work on the topic "draft articles". That in no way prejudiced the status and legal value of the provisions they contained. That status and value depended primarily on what States did with the draft articles after their final adoption by the Commission. States could convene a conference in order to draft a treaty, but they could also turn the draft articles into guidelines, or even conclusions. It was up to them to decide, and the Commission should not try to anticipate that decision. The real question was whether and, if so, to what extent, the Commission was claiming that the draft articles expressed current customary international law. States' concerns in that respect were legitimate and had to be addressed. For that reason, while he disagreed with the view of the United States that the project should not "ultimately take the form of draft articles", he was convinced that they were right in asking the Commission to make it clear which aspects of the draft articles reflected progressive development, so as not to leave "the incorrect impression" that all the other draft articles (not so designated) reflected codification.[44] It would be going too far, however, to follow the recommendation of the United States that the commentary should "include a clear statement at the outset" that the draft articles substantially reflected "proposals for progressive development of the law and should not, as a whole, be relied upon as codification of existing law".[45] However, it would be honest and prudent to add, in the introductory part of the commentary, a statement to the effect that:

[42] IASC Non-Binding Guidelines on the Use of Armed Escorts for Humanitarian Convoys, 27 February 2013, available from the website of the United Nations Office for the Coordination of Humanitiarian Affairs: www.unocha.org.

[43] *Official Journal of the European Communities*, No L 314 of 28 December 1995, decision of the representatives of the Governments of the Member States meeting within the Council of 19 December 1995, regarding protection for citizens of the European Union by diplomatic and consular representations, p. 73.

* Resumed from the 3199th meeting.

[44] See A/CN.4/669 and Add.1, general comments and final form of the draft articles.

[45] *Ibid.*, final form of the draft articles.

"1. In the following commentary, the Commission has strived to indicate which provisions of the draft articles it considers to be codification of existing law and which provisions it considers to be proposals for progressive development", and "2. Where the Commission has not given such a specific indication, no presumption applies that the respective provision concerned reflects either codification or progressive development, but its legal status must be derived from the sources which are quoted in support of it in the commentary".

34. In his opinion, the most fruitful way for the Commission to proceed would be first to have the Drafting Committee consider the individual draft articles and their respective commentaries in light of States' observations, and then to indicate, as far as it was possible and practicable, if they reflected codification or progressive development. Given that proposed general approach, he would comment only very briefly on some specific draft articles and would reserve his further comments for deliberations in the Drafting Committee.

35. With regard to draft article 1, there was merit in the argument that the distinction between aliens lawfully present in a State and those unlawfully present required clarification. Nevertheless, that was no reason to modify the scope of the draft articles. The recommendation of the United States that draft articles 2 and 11 should be harmonized, mainly in order to establish the intentionality requirement, should be heeded. The Special Rapporteur had demonstrated his readiness to work in that direction. It was also necessary to respond to some States' concerns about the phrase "the non-admission of an alien other than a refugee".[46] As the United States had commented, draft article 3, as it stood, could give the wrong impression that the Commission considered all the draft articles to be binding rules of international law. The deletion of the word "other" would, however, have the opposite effect. The Drafting Committee should examine that point. In draft article 5, paragraph 3, as suggested by the United Kingdom, a distinction should be drawn between aliens who were lawfully present in a country and those who were not. Lastly, several substantial concerns voiced by States with respect to draft article 11 should be addressed.

36. He again thanked the Special Rapporteur for his excellent work and hoped that the Commission would, to quote Tomuschat, allow the draft articles to remain "permeated by a spirit of enlightened modernism which takes the rule of law and human rights seriously, without placing them ahead of any other consideration of public interest".[47]

37. Mr. FORTEAU said that, in reality, even though expulsion was a legitimate means of protection for States, it was a serious act that had far-reaching repercussions on the life of the persons who had undergone it. Legally speaking, expulsion was an area of general international law where rules had existed for more than a century and, no matter how sensitive a subject it might be, there were no objective grounds for taking issue with the choice of adopting draft articles. Even disagreement with some of the views of the codifier was no reason to deny that codification was possible, as some States had done. Generally speaking, what was extremely problematic was that the draft articles made no provision for possible derogations along the lines of article 4 of the International Covenant on Civil and Political Rights and it allowed no exceptions to the rights set forth, for example, in draft article 26.

38. Moving on to the individual draft articles, he welcomed the fact that States had not called into question draft article 4, which constituted a substantial step forward, since it made any breach of domestic law a breach of international law in accordance with the interpretation of the applicable treaty law by the International Court of Justice in the case concerning *Ahmadou Sadio Diallo*. On the other hand, he agreed with several States and members of the Commission that it would be wiser to exclude refugees from the scope of the draft articles through a general "without prejudice" clause, because the draft articles were very likely to be inconsistent with refugee law.

39. In draft article 9, it would be inadvisable to refer to the principle of the non-expulsion of nationals. He even wondered whether that provision which, in fact, concerned nationals, really came within the scope of the draft articles. He was also dubious of the merits of draft article 15, paragraph 1 of which did not seem to reflect State practice. Draft article 19 should draw a distinction between detention and detention conditions, and the restrictions on a State's right to resort to detention for expulsion purposes should be spelled out before the separate matter of detention conditions was addressed.

40. As far as draft article 26 was concerned, it was difficult to state in paragraph 1 (*a*) that an alien had the right to receive notice of the expulsion decision, since the relevant case law, in particular the judgment rendered in 2010 in the *Ahmadou Sadio Diallo* case, made no reference to that procedural requirement, and it had no place in an international law text. On the other hand, he supported the amendment to paragraph 4 proposed by the Special Rapporteur.[48]

41. The amendment proposed by the Special Rapporteur to draft article 27, which would qualify the scope of the suspensive effect of an appeal, the absolute nature of which had given rise to some legitimate concerns, might make it possible to retain that provision.[49] When the Commission considered that matter, it would be worth bearing in mind the judgment rendered in 2013 by the European Court of Human Rights in the case of *De Souza Ribeiro* v. *France*.

42. Lastly, he still thought that draft article 29 was rooted not in the primary, but in the secondary rules of the law of international responsibility, in particular the rules on compensation, and he was inclined, as he had been in 2012, to propose that it be deleted and that its substance be included in the commentary to draft article 31.

The meeting rose at 1 p.m.

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[46] *Ibid.*, specific comments on the draft articles.

[47] C. Tomuschat, "Expulsion of aliens: the International Law Commission's draft articles", *in* G. Jochum, W. Fritzemeyer and M. Kau (eds.), *Grenzüberschreitendes Recht—Crossing Frontiers: Festschrift für Kay Hailbronner*, Heidelberg, C. F. Müller, 2013, p. 662.

[48] See the 3199th meeting above, p. 8, para. 16.

[49] *Ibid.*, p. 8, para. 17.

3202nd MEETING

Friday, 9 May 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti.

Expulsion of aliens (*continued*) (A/CN.4/669 and Add.1, A/CN.4/670, A/CN.4/L.832)

[Agenda item 2]

NINTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the ninth report of the Special Rapporteur on the topic of expulsion of aliens (A/CN.4/670).

2. Mr. NIEHAUS said that in the comments and observations made by States during the discussion in the Sixth Committee, varied and sometimes contradictory opinions had been expressed, including that the topic was not suitable for codification and that the traditional practice through which States had full discretion to expel a foreigner from their territory without any outside interference should be retained. There seemed to be much confusion among States about the content of certain draft articles, which in his opinion was due primarily to their wording and was a problem that would have to be addressed in the Drafting Committee.

3. With regard to draft article 1, the opposition of some States to granting equal treatment to aliens both lawfully and unlawfully present in the territory of a State was contrary to the correct position, clearly enunciated by the Special Rapporteur, that no distinction should be made between individuals when it came to their fundamental human rights.

4. The text of draft article 3 was perfectly clear and should be retained absolutely unchanged. He agreed that the suggestion of one State to amend it to require that expulsion be carried out in accordance with the "international legal obligations" of a State was much too vague.[50]

5. Draft articles 6 and 8, which regulated the expulsion of refugees, were problematic, and he agreed that it was better not to include such rules in draft articles. Draft article 9, on deprivation of nationality for the sole purpose of expulsion, was an important provision. In the plenary discussion, he had pointed out that, in certain Latin American countries during the Second World War, citizens of German origin had been stripped of their legitimate nationality and German nationality imposed on them by executive decree, purely as a means of confiscating their property. That legal aberration demonstrated how deprivation of nationality could be misused. It was regrettable that the principle whereby a State could not expel its own nationals was no longer included in the draft articles. Draft article 12 on prohibition of expulsion for the purposes of confiscation of assets was closely linked to draft article 9, and thus it made sense to merge the two.

6. Although draft article 15 addressed a valid concern, the wording of paragraph 1 was ambiguous and misleading, and it should be reformulated. As it currently stood, the text appeared to indicate that some forms of discrimination were permissible under international law.

7. With regard to article 26, he did not share Mr. Forteau's view that the right of an alien subject to expulsion to receive notice of the expulsion decision was a mere formality. On the contrary, it was an important procedure that was useful in defending the rights of individuals, as were the other procedural rights set out in the draft article.

8. Lastly, although it would be ideal for the outcome of the Commission's work to take the form of a convention, that decision had to be taken by States at the General Assembly. For the time being, what was important was for the Commission to finish its work on the topic and approve the draft articles on second reading, taking into account those comments and observations by States that would help to improve the wording of the draft articles, to ensure that they were better understood and to enhance their acceptance.

9. Mr. MURPHY said that in 2012, of the 22 States that had made comments in the Sixth Committee on the form that the Commission's project should take, 16 had asserted that it should not become draft articles. Of the 14 States from which the Commission had received written comments, 7 had indicated that they were against finalizing the project as draft articles. Among the reasons given for some States' opposition to the production of draft articles was that the text advanced new principles that failed to reflect the current state of international law or State practice; that it went beyond the purview of existing multilateral treaties; that the existence of detailed regional law on the topic made it inappropriate and unhelpful to establish new uniform global rules; that, by its very nature, the topic was not appropriate for a treaty; and that the text was overly solicitous of the rights of aliens. Two States had not only rejected the idea of turning the Commission's work into draft articles, but had called for it to terminate the project entirely. He himself was against doing so, but he was sympathetic to the concerns expressed by States, including the argument that many national laws, regional instruments and widely ratified human rights treaties governed the protection of individuals subject to expulsion, but in many instances the Commission's text deviated from those rules.

10. All those concerns seemed to arise from a particular difficulty, namely that the Commission was attempting to codify a set of rules in an area in which States already had well-developed and long-standing regulations. Every country in the world had detailed rules on immigration and deportation, rules that touched upon sensitive national security concerns.

[50] See A/CN.4/669 and Add.1, observations on draft article 3.

11. There appeared to be two possible responses to those concerns. The first was to reformulate the project as something other than draft articles, such as draft principles or draft guidelines. On three occasions, the Commission had characterized the outcome of its work as draft principles, doing so in each instance in order to influence the later development of either international law or national law without dictating a uniform set of rules.[51] The Commission was in a similar situation with the topic of expulsion of aliens, in that its objective was to encourage States to develop existing national regimes in the direction of the principles set forth in the project. Since it was not the Commission's intention to alter existing treaties governing expulsion, such as conventions on the treatment of refugees or migrant workers, perhaps it should craft its rules as general principles that helped to guide States as they established and amended their own rules.

12. A second response was to continue with the project as draft articles, although he concurred with Mr. Nolte that simply ignoring the reasons behind the strong reactions by States would be a mistake. The Commission should make adjustments to the draft articles where possible in order to accommodate those concerns. Where adjustments were not made, the Commission might be able to get past some of the criticism of particular articles by agreeing that the commentaries would refer to them as progressive development. He endorsed Mr. Nolte's idea of including a statement at the beginning of the commentaries that silence with regard to whether a particular draft article constituted progressive development did not create a presumption of codification; instead, the strength of the rule as a form of codification should stand or fall on the strength of the authorities cited in the commentary.

13. With regard to draft article 1, several States remained opposed to the coverage in the draft articles of aliens unlawfully present in the territory of the State, considering them to fall into a category distinct from that of aliens lawfully present. None contested the fact that aliens unlawfully present were entitled to human rights, but the concern was that the Commission was establishing the same rights for an individual who overstayed a two-week visa as for one who had lived in a country as an alien resident for 10 years. He tended to share that concern and thought that the Commission should ask itself, as it went through the draft articles, whether all of them should apply to aliens unlawfully present in the territory of a State.

14. With regard to article 2, he supported the Special Rapporteur's proposal to include the word "intentional" before "conduct" in subparagraph (*a*). Such a change would help to harmonize draft article 2 with draft article 11.

15. Many States had expressed the concern that the draft articles conflicted with the 1951 Convention relating to the Status of Refugees: draft article 2, for example, declared that the non-admission of a refugee was a form of expulsion. He tended to agree with Mr. Forteau that the Commission's efforts to address such conflicts by means of draft article 8 had merely generated confusion and criticism. The Commission should therefore consider excluding refugees from the scope of the project, since their expulsion was already covered by the Convention relating to the Status of Refugees, a long-standing and widely ratified instrument.

16. On draft article 3, the United States had pointed out that the relationship of the draft articles to other treaty regimes was unclear.[52] Several of the rights embodied in the text were rights from which derogation was permissible under other treaty regimes. However, draft article 3 expressly stated that expulsion had to be in accordance with both the draft articles and other applicable rules of international law. That appeared to preclude derogation, yet confusingly, the commentary to draft article 3 allowed for derogation in certain cases.[53] Clearly, that issue would have to be addressed by the Drafting Committee.

17. Draft article 15 stipulated that States must exercise their right to expel aliens without discrimination on grounds such as property and nationality. The Special Rapporteur seemed to have misunderstood the comment by the United States,[54] in which it had simply cited certain admission practices to illustrate how expulsion might occur for property-related reasons. Poverty or dependence on Government benefits was often grounds, in and of itself, for expulsion in many States. In its memorandum on the expulsion of aliens, the Secretariat had identified some 24 States that had property-based grounds for expulsion.[55] Moreover, numerous immigration law scholars asserted that nationality-based distinctions were quite common and were generally accepted. Indeed, at its most basic level, the expulsion of aliens was, by definition, discrimination on the basis of nationality, in that it involved expelling persons who did not possess the nationality of the expelling State.

18. In the European Union, a distinction was made between persons with and without the nationality of a member State: the protections against expulsion set out in articles 27 and 28 of Directive 2004/38/EC of the European Parliament and of the Council on the right to free movement and residence[56] did not apply to citizens of non-European Union member States, who were covered solely by the protections contained in the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) with regard to expulsion.

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[51] See the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and the Judgment of the Tribunal ("Nürnberg Principles"), *Yearbook … 1950,* vol. II, document A/1316, pp. 374 *et seq*., paras. 95–127; the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook … 2006*, vol. II (Part Two), pp. 58 *et seq*., paras. 66–67; and the guiding principles applicable to unilateral declarations of States capable of creating legal obligations, *ibid.*, pp. 161 *et seq*., paras. 176–177.

[52] See A/CN.4/669 and Add.1, observations of the United States on draft article 3.

[53] *Yearbook … 2012,* vol. II (Part Two), pp. 20–21, commentary to draft article 3.

[54] See A/CN.4/669 and Add.1, observations of the United States on draft article 15.

[55] See document A/CN.4/565 and Corr.1, mimeographed; available from the Commission's website, documents of the fifty-eighth session (2006). The final text will be reproduced in an addendum to *Yearbook … 2006,* vol. II (Part One).

[56] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens and the Union and their family members to move and reside freely within the territory of the Member States, *Official Journal of the European Union*, No L 158 of 30 April 2004.

19. With regard to draft article 24, in his introductory remarks the Special Rapporteur had seemed to criticize the United States for making a distinction between "torture" and "cruel, inhuman or degrading treatment or punishment". While the Special Rapporteur contended that the Convention against torture and other cruel, inhuman or degrading treatment or punishment did not make that distinction, he himself drew attention to the *non-refoulement* provision in article 3 as proof that the distinction was indeed set out in the Convention.

20. He supported referring the set of draft articles to the Drafting Committee for further review in light of the comments that the Commission had received from States.

The meeting rose at 10.40.

3203rd MEETING

Tuesday, 13 May 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Expulsion of aliens (*continued*) (A/CN.4/669 and Add.1, A/CN.4/670, A/CN.4/L.832)

[Agenda item 2]

NINTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the Special Rapporteur's ninth report on expulsion of aliens (A/CN.4/670).

2. Mr. TLADI said that, like Mr. Forteau, he considered that the final product of the Commission's work should take the form of draft articles. With regard to draft article 1, he noted that the United Kingdom had objected to the fact that the draft articles applied to all aliens, whether or not they were lawfully present in the territory of a State.[57] Relevant as it was, that issue in fact related to applicable standards and was not a matter to be addressed in a draft article on scope. With regard to draft article 3, he considered that the current formulation should be retained, since the new wording proposed by the United States was less balanced. Nevertheless, the first sentence could be modified to read: "A State may only expel an alien in accordance with its obligations under international law".

3. With regard to draft article 15, he was not opposed to the proposal to include sexual orientation among the grounds for discrimination listed in paragraph 1. As to draft article 24, the Drafting Committee would probably need to address implementation issues and to clarify what was meant by the phrase "substantial grounds for believing". Noting that some States had rightly observed that the draft article extended the scope of the *non-refoulement* principle set forth in article 3 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, he stressed that such progressive development was in line with the values espoused by the vast majority of States. Lastly, he had changed his mind regarding the inclusion of refugees within the scope of the draft articles, and he agreed with Mr. Forteau that it would be preferable that they should not be included because of possible conflicts with the Convention relating to the Status of Refugees.

4. Mr. PARK said that the Commission should take account of the often conflicting comments and observations received from States, while refraining from making any substantive changes to the draft articles already adopted on first reading. In that connection, it was important not to reject certain States' reservations on the ground that they were based on domestic considerations rather than arguments derived from international law. With regard to draft article 1, he shared the view of the Special Rapporteur that the Commission should not revisit its approach of including in the scope of the draft articles both aliens lawfully present in the territory of a State and those unlawfully present. As to draft article 2, the Drafting Committee should take into account the amendments to subparagraphs (*a*) and (*b*) proposed by certain States. With respect to draft article 7, he noted that only States that had not ratified the 1954 Convention relating to the Status of Stateless Persons had considered that article unnecessary and requested its deletion. As to draft article 10, which reflected article 22 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, it was understandable that it had not been endorsed by States that had not ratified the Convention. The Drafting Committee should take account of the fact that the prohibition of collective expulsion, which was an established principle of international law, involved procedural rules of differing legal value.

5. The Drafting Committee should also take account of the concerns of certain States regarding the criterion for attribution of individual conduct to the State, set forth in draft article 11, paragraph 2, which was indeed broader than the criterion contained in the 2001 articles on the responsibility of States for internationally wrongful acts.[58] As to draft articles 14 and 15, he considered that in view of their general character they should be included in another part of the draft articles. With regard to draft article 19, he had no objection to the proposal to insert the words "or administrative" after "judicial" in paragraph 2 (*b*). Regarding the observations of the European Union on the

[57] See A/CN.4/669 and Add.1, observations of the United Kingdom on draft article 1.

[58] General Assembly resolution 56/83 of 12 December 2001, annex. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq*., paras. 76–77.

draft article,[59] the question would arise as to whether other regions of the world would be able to accept them readily.

6. As to draft article 23, the Drafting Committee should take account of the fact that certain States had considered that the article extended to expelled aliens the scope of application *ratione personae* of the *non-refoulement* principle contained in article 33 of the Convention relating to the Status of Refugees, although there was no basis in international law for doing so. The Committee should also consider the proposals for clarifying the conditions for the application of the draft article. It should also not ignore the fact that certain States had considered that draft articles 27 and 29 to be unacceptable, and it would therefore have to decide whether those articles should be deleted or retained by way of progressive development.

7. Mr. PETRIČ welcomed the Special Rapporteur's readiness to reconsider certain draft articles in light of the observations received from Governments and expressed the hope that the Drafting Committee would have adequate time to consider them. He noted that a significant number of States had expressed their preference for a non-binding instrument, no doubt because they were concerned about the impact that the new obligations might have on the rules and practices dealing with the expulsion of aliens that they had already adopted nationally or regionally. Although the idea of adopting guidelines or guiding principles that sought to unify a wealth of diverse practice might at first sight seem attractive, it would in fact be entirely inappropriate at the current stage of work to set aside draft articles on which the Commission had been working for years, particularly given that they were without prejudice to any form that the General Assembly might wish to give them. Lastly, the Drafting Committee should give due attention to the observations of States that considered it necessary to distinguish between aliens who were lawfully present on the territory of a State and those who were unlawfully present and to treat each category differently. In that regard, the Committee should list those draft articles in which that difference could be made clearer.

8. Mr. HMOUD said that he wished to make a few comments on the debate that had taken place in the Sixth Committee of the General Assembly on the draft articles adopted on first reading and on the comments and observations received from Governments. States had expressed divergent views on the suitability of the topic for codification and on the need to develop general rules of international law. In that regard, it had been repeatedly emphasized that as State practice with respect to the expulsion of aliens was quite divergent, the topic was a matter for domestic law only. While it was true that there was a wealth of contradictory practice, it should be borne in mind that there were well-established principles in international law on the expulsion of aliens. The fact that some of the rules contained in the draft articles constituted progressive development was not unusual; it would be up to States to determine their legal weight once the articles had been adopted in their final form. In his opinion, those rules struck a careful balance between the rights of States and the rights of aliens subject to expulsion and they were properly based on State practice and the rulings of national and international courts that clearly demonstrated that the right to expel was no longer an absolute right.

9. With regard to the final form of the draft articles, he said that given that many of the principles on which the text was based were already, or would become, part of general international law, it would be in the interest of States and the international community to adopt the draft articles in the form of a convention. Concerning the inclusion of aliens unlawfully present in a State's territory within the scope of the draft articles, the Commission had already reacted positively by emphasizing that it would, as appropriate, provide clarification in regard to specific draft articles concerning the treatment to be given to that category of aliens. Not to include them would create inequalities in the exercise of basic rights under the draft articles and loopholes that could lead to abuse.

10. As for the expulsion of refugees, the Drafting Committee should consider two issues in light of comments received from States: the exceptions contained in article 1, section F, of the Convention relating to the Status of Refugees, which in his view should be included in the body of draft article 8 rather than in the commentary, and the prohibition of the expulsion of a refugee unlawfully present in the territory of the State while his or her application for recognition of refugee status was pending, envisaged in draft article 6, paragraph 2. Draft article 6, which also constituted progressive development, was supported by State practice and should not be altered on second reading, especially since States would subsequently be free to determine its legal value. Divergent views had also been expressed on the main consequence of unlawful expulsion, namely readmission, provided for in draft article 29. The draft article did indeed constitute progressive development and should be retained as it stood because it struck a careful balance between the legitimate interests of States and the rights of unlawfully expelled aliens by setting reasonable limitations on the obligation of readmission.

11. Ms. ESCOBAR HERNÁNDEZ said that a number of States had objected to the Commission's work taking the form of draft articles, which would ultimately become a convention, preferring instead draft principles or guidelines or a guide to best practice. However, the current project was too far advanced for the Commission to consider such drastic changes, which were not at all warranted. Furthermore, work on draft articles should not be likened to work on a treaty and, as experience had shown, the power to legislate ultimately rested with States alone, which would decide whether or not to confer on the draft articles the normative value of a convention—even though a convention might well be the desirable outcome in the present case.

12. The commentaries and observations of States demonstrated a tendency to polarize the two aspects of the Commission's mandates—codification and progressive development—and largely to favour the former in some instances. However, those two aspects were inextricably linked. Although it was legitimate for States to seek to distinguish between them, and although the Commission

[59] *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), paras. 61–62.

referred in the commentary to the progressive development aspect of certain provisions, it would nonetheless be inappropriate to include in the draft articles a general statement on the respective roles of codification and progressive development. As the Commission's particular task was to contribute to the evolution of international law, it was essential to maintain a balance between the two aspects of its mandate.

13. Turning to the draft articles, she said that the references to refugees in draft articles 2, 6 and 8, in particular, properly reflected the specific character of their protection regime and that therefore no substantive reworking of those articles was necessary. With regard to draft article 6, a reference to article 1, section F, of the Convention relating to the Status of Refugees should be included in the commentary in order to clarify the scope of the prohibition of expulsion, as proposed by the Special Rapporteur, and paragraph 3 should be modified in order to ensure consistency with draft article 23, paragraph 1, and draft article 24. It would also be a good idea for the without prejudice clause contained in draft article 8 to refer expressly to the fact that the rules concerned were those that were more favourable to refugees and stateless persons, either in the actual text of the draft article or in the commentary, as proposed by the Special Rapporteur.

14. The wording of draft article 9 was satisfactory; including the expulsion of nationals would amount to exceeding the scope of the draft articles. As regards draft article 16 on vulnerable persons, the reference to "the best interests of the child" should be retained because it was a key contribution of the Convention on the rights of the child, which had been ratified by nearly all States.

15. As far as draft article 26 was concerned, the requirement for a written notification of the expulsion decision would strengthen the procedural rights of aliens subject to expulsion. As to draft article 27, several States had expressed concern that the suspensive effect of an appeal against an expulsion decision was formulated in absolute terms and thus did not accord well with the variety of legal systems that existed. In order to address those concerns, the Commission could take into account the development of international human rights law in that area, in particular the jurisprudence of the European Court of Human Rights, which, in its judgment of 22 April 2014 in *A. C. and Others* v. *Spain*, had established the idea that the guarantee of the effectiveness of appeals might involve the suspension of an expulsion decision in light of the irreparable consequences the expulsion might have for the human rights of the person concerned. The Drafting Committee might thus rework draft article 27 so as to make the suspensive effect of the appeal subject to the irreversible nature of the violation of the alien's rights likely to result from his or her expulsion if the expulsion took place before a decision had been taken on the merits of the appeal.

16. Mr. HASSOUNA said that, although the comments and observations received reflected the opinions of only a minority of States, the diversity of those opinions and the opposition to, and doubts about, the fundamental approach adopted and even the topic's suitability for codification were understandable given its sensitivity. Although, at the current stage, the overall balance of the draft articles should not be questioned, some of the proposals made by States could help clarify various points. For instance, with regard to the definition of expulsion in draft article 2, he agreed with the suggestion that the same criteria of attribution should be applied as those used in the articles on the responsibility of States for internationally wrongful acts. As to draft article 5, he supported the proposal to make clear in the commentary that the grounds for expulsion should be considered at the time of the decision rather than at the time of removal. In relation to draft article 9, he agreed with the suggestion to recall in the commentary the principle whereby a State could not expel its own nationals. He further considered it justified to include within the scope of the draft articles, which was defined in draft article 1, both aliens lawfully present in the territory of a State and those unlawfully present, and to make a distinction between certain procedural rights of those two categories of aliens, but not between their essential rights, such as those contained in draft articles 14 and 4.

17. Draft article 6, paragraph 3, and draft articles 23 and 24 should be referred to the Drafting Committee, which should ensure greater consistency in their formulation. In particular, it would have to choose between "reasonable grounds for regarding", which appeared in draft article 6, and "substantial grounds for believing", which appeared in draft article 24. Furthermore, although draft article 6 expressly provided for an exception to the prohibition to expel refugees on grounds of national security or public order, there was no similar provision in draft articles 23 and 24, which set forth the grounds for the prohibition of expulsion of other aliens, or in the corresponding commentaries. It was therefore necessary to clarify that point on the basis of the Special Rapporteur's proposal; that would allay the concerns of those States which considered that the draft articles placed too little emphasis on the issue of national security and public order.

18. In draft article 19, paragraph 2 (*b*), it would make sense to state, as had been proposed, that the decision to extend the duration of the detention "must be reviewable by" a court or a person authorized to exercise judicial power in order to prevent any abuse by the administrative authorities who, in some countries, were the authorities responsible for such a decision.

19. However, in draft article 27, it would be inappropriate to limit the suspensive effect of the appeal only to cases where the expulsion would result in "irreparable harm", because even though the Commission must strike a more equitable balance between the interests of States and those of aliens subject to expulsion, the inclusion of that condition would undermine the very purpose of that draft article, which was, as the commentary made clear, to address the obstacles likely to cause an appeal to fail once the alien had been expelled.[60]

20. It remained for the Drafting Committee to address the issues of substance, language and terminology that had been raised, taking account of the observations of States and Commission members. As to the final form of the draft articles, that was a matter for the General Assembly to decide.

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[60] *Yearbook … 2012*, vol. II (Part Two), pp. 46–47, commentary to draft article 27.

21. Mr. ŠTURMA said that transforming the draft articles into draft principles, as certain States wished,[61] involved much more than a simple change of name. As form and content were inextricably linked, any such change would mean revisiting the whole topic. States should certainly have their say on methodology, but not after nearly a decade of work. Once the draft articles had been adopted on second reading, States would be able to decide whether they wished to elaborate a binding instrument.

22. The scope defined in draft article 1 should of course cover all aliens, whether lawfully or unlawfully present in the territory, even though differential treatment might be applied where appropriate with regard to certain procedural rights. As to the prohibition of the expulsion of refugees, the subject of draft article 6, it should be made clear, in the commentary at least, that the article did not amend in any way the Convention relating to the Status of Refugees. It would also be useful to clarify, as the European Union had recommended, that the other rules specific to the expulsion of refugees and stateless persons referred to in draft article 8 were those that were the most favourable to persons subject to expulsion.[62] The prohibition of the resort to expulsion in order to circumvent an extradition procedure, provided for in draft article 13, should not preclude flexibility in cooperation between sovereign States. The obligation to respect the human dignity and human rights of aliens subject to expulsion set out in draft article 14 was self-evident, but should be accompanied by a derogation clause, as was the case with other human rights instruments. As to the obligation not to discriminate, provided for by draft article 15, it should cover only discrimination that was not justified by reasonable and objective grounds. Lastly, the suspensive effect of an appeal against an expulsion decision envisaged in draft article 27 should apply only "where execution of the decision could cause irreparable harm".

23. Mr. SABOIA said that although the comments of States on the draft articles, by reason of their number and geographical origin, were not representative of the international community as a whole, they should nonetheless be taken into consideration, if only out of respect for the States that had taken the trouble to make them. Even if the draft articles did not become a convention, as recommended by the Special Rapporteur, their provisions would acquire increasing legal force as international courts referred to them as constituting codification or progressive development of international law.

24. With respect to the ninth report, he welcomed the Special Rapporteur's emphasis in paragraph 19 on the importance of regional law, not only European law, but also the law of other regions of the world, in particular Latin America, whose Cartagena Declaration on Refugees[63] deserved mention. Universal treaties were also part of general international law, on the same basis as customary law, as paragraph 21 of the ninth report made clear. The inclusion of aliens in an irregular situation within the scope of the draft articles was necessary because the articles would be of limited use if they did not apply to persons who were not only those most at risk of expulsion, but also the most numerous and the most vulnerable at a time of increasing globalization. The Commission had managed to strike a balance between the sovereign right of States to regulate the presence of aliens on their territories and the need to protect the fundamental rights of aliens, including the rights of aliens in an irregular situation; it could still make some amendments to the draft articles to reflect the concerns of certain States in that regard, while nonetheless maintaining that "spirit of enlightened modernism" mentioned in paragraph 76 of the ninth report. Lastly, he stressed the importance of referring to stateless persons and to collective expulsion, the prohibition of which was a principle of international law, and of extending the *non-refoulement* obligation to the risk of cruel, inhuman or degrading treatment or punishment, even though those acts were not defined in the Convention against torture and other cruel, inhuman or degrading treatment or punishment.

25. Mr. EL-MURTADI SULEIMAN GOUIDER recalled that the Commission worked for the benefit of States and that it should therefore take account of their comments and wishes. However, it was also governed by a mandate that States themselves had defined and which they in turn should take into account, bearing in mind that it consisted of two aspects—codification and progressive development of international law—even though it was not always easy to distinguish between the two. It was quite difficult to draw general conclusions about the comments as a whole, especially since some were based on purely national considerations that disregarded positive law and State practice.

26. Turning to the draft articles, he said that in the scope as defined in draft article 1, no distinction should be made between aliens in a regular situation and those in an irregular situation, since what was under discussion was fundamental rights. The obligation not to discriminate already existed in positive international law and draft article 15 did not therefore introduce anything new, as the Special Rapporteur had underlined. The suspensive effect of an appeal against an expulsion decision, provided for in draft article 27, was indispensable, but the reason why it had given rise to so many reservations by States was probably due to its being presented in the commentary as constituting progressive development of international law,[64] whereas it should perhaps come under the protection and promotion of aliens' rights. As to the final form of the draft articles, the prevailing view seemed to favour a non-binding document, but it was not necessary for the Commission to consider that issue at the present stage.

27. Mr. KITTICHAISAREE said that it was necessary to reach a balance based on State practice and international jurisprudence so as to reconcile the position of those States who considered that the draft articles established a level of protection lower than what they themselves

[61] See A/CN.4/669 and Add.1.

[62] *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 58.

[63] Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena de Indias from 19 to 22 November 1984; available from: www.acnur.org/cartagena30/en, *Documents*.

[64] *Yearbook … 2012*, vol. II (Part Two), pp. 46–47, commentary to draft article 27.

provided to aliens subject to expulsion, and those who considered that the draft articles went beyond the regime provided for by their legislation and the treaties to which they were party. As to the final form of the work, even if the draft articles did not become a convention, their legal force would grow as courts increasingly referred to them in order to interpret international law.

28. The inclusion of aliens unlawfully present in a State's territory within the scope of the draft articles was necessary because those persons obviously had the same fundamental rights as those lawfully present; it should be borne in mind, however, that a separate status with regard to immigration regulations entailed separate safeguards and that differences in treatment were therefore acceptable if they were reasonable and proportional. However, the inclusion of refugees and stateless persons was perhaps not warranted, as Mr. Forteau and Mr. Murphy had observed, because draft articles 6, 7 and 8 added nothing to what was already provided for by the Convention relating to the Status of Refugees and the Convention relating to the Status of Stateless Persons.

29. Draft articles 23 and 24 were fundamental inasmuch as they confirmed that the *non-refoulement* principle was absolute and applied to any person regardless of his or her migratory status. No derogation was permitted from that principle on the basis of such considerations as national security or an alien's situation with regard to criminal law. Similarly, the existence of a distinction between the risk of torture and the risk of cruel, inhuman or degrading treatment or punishment had not been confirmed by international jurisprudence.

30. He shared the Special Rapporteur's view regarding the usefulness of recalling, at least in the commentary to draft article 9, the principle whereby a State could not expel its own nationals. He also agreed with the idea of splitting draft article 19, since, like Mr. Forteau, he considered that recourse to detention and the conditions of detention should be dealt with in separate articles. Emphasis should also be placed on the fact that detention must on no account be arbitrary. In paragraph 2 (*a*), the words "excessive duration" were too vague and the phrase "reasonably necessary" should be defined in the commentary. With regard to paragraph 3 (*b*), in order to avoid creating legal uncertainty, it should be made clear that the attribution to the alien of the reasons preventing his expulsion must be objective and that the length of the continued duration must be commensurate with those reasons. With regard to the rights set forth in draft article 26, the proposal by the European Union to notify the alien in writing of the expulsion decision and of the remedies available warranted consideration.[65] Lastly, rather than making the suspensive effect of an appeal provided for in draft article 27 subject to the existence of a risk of irreparable harm, as had been proposed, he suggested adding a paragraph to the draft article in order to grant the alien the right to request provisional measures when the implementation of the expulsion decision might entail irreparable harm and when no effective remedy was available.

31. Mr. VÁZQUEZ-BERMÚDEZ said that, at the stage of second reading, it was important to preserve the balance that the Commission had struck, after lengthy debate, between the rights of sovereign States and those of aliens subject to expulsion. The observations of States should be reflected in the commentary or through drafting amendments so that this balance would not be significantly disrupted. Similarly, at the current stage, the text should keep the form of draft articles, irrespective of what the General Assembly might decide subsequently. As with all the Commission's previous work and in accordance with its mandate, the draft articles on expulsion of aliens constituted both codification and progressive development of international law, even though it was indeed not always possible to distinguish between the two aspects.

32. With regard to the draft articles themselves, he wished to mention a terminology issue. The distinction made in draft article 1 between aliens who were lawfully present in the territory of a State and those who were unlawfully present was crucial, but it was more appropriate to refer to "regular" or "irregular" presence rather than "lawful" or "unlawful" presence.

33. In conclusion, he noted that a large number of States had welcomed the draft articles, the adoption of which would represent an important step towards the humanization of international law that had been going on for half a century.

The meeting rose at 1.05 p.m.

3204th MEETING

Wednesday, 14 May 2014, at 10 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Statement by the Under-Secretary-General for Legal Affairs, United Nations Legal Counsel

1. Mr. DE SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that, in keeping with the established practice, he would offer an overview of the activities of the Office of Legal Affairs, focusing on particularly noteworthy legal developments in the past year.

2. One of the Secretary-General's top priorities was to combat impunity and build an age of accountability. The Office of Legal Affairs accordingly dedicated much time

[65] *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 66.

and energy to matters related to international criminal justice and to supporting the work of international tribunals and the International Criminal Court.

3. Since 1999, and with increasing frequency, the Security Council had been authorizing peacekeepers to use force not only for self-defence, but also to protect civilians threatened with imminent physical violence. A case in point was the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), which the Security Council had recently tasked with carrying out offensive operations.[66] That was the first time such a mandate had been accorded, and it raised a host of legal questions. In what circumstances would United Nations peacekeeping forces become a party to the conflict in the Democratic Republic of the Congo? What would be the consequences in law if they did? How should members of a peacekeeping force treat members of armed groups that might be captured? How should allegations that members of a peacekeeping force had violated international humanitarian law or committed war crimes be dealt with?

4. International humanitarian law, international human rights law and international criminal law had evolved substantially over the last half-century, especially with respect to situations of non-international armed conflict. The Office of Legal Affairs had therefore prepared practical guidance for military commanders on how to apply certain fundamental principles of international humanitarian law when launching attacks on armed groups and had developed state-of-the-art procedures for dealing with members of armed groups who were captured during offensive operations.

5. In South Sudan, an internal split within the army had led to a new outbreak of conflict and the displacement of many civilians: 85,000 had sought refuge in the compounds of the United Nations Mission in South Sudan. That had strained the Mission's resources and raised a number of complex issues concerning the interpretation of the Mission's mandate. What could the United Nations do to maintain order among such a large number of civilians who might be supporting opposing political groups? What could the United Nations do to ensure the security of its own personnel and property? How should it handle cases of individuals wanted by local law enforcement agencies for offences committed either outside or inside the United Nations compounds? Those problems were especially acute in South Sudan, where Government institutions were weak, with limited capacity to deliver criminal justice complying with international standards of due process, yet with the power to impose the death penalty.

6. Following a series of landmark decisions in a decade of operations, the Special Court for Sierra Leone had concluded its work with the appeal judgment in the case against former Liberian President Charles Taylor, who was now in the United Kingdom serving a 50-year sentence.[67] In the first occasion in modern international criminal justice when a new, independent institution had taken over from a predecessor, the Residual Special Court for Sierra Leone had commenced operations on 1 January 2014. The staff of the new institution was already engaged in the essential work of witness protection, archive management and preservation and sentence enforcement. The Office of Legal Affairs was supporting that work, and he hoped that the international community would do likewise, particularly by ensuring that the Court was on a secure financial footing. The trial in the *Ayyash* et al. case, relating to the attack in February 2005 on Rafiq Hariri, the former Primer Minister of Lebanon, had commenced in January 2014 at the Special Tribunal for Lebanon. The proceedings against the accused were being held *in absentia*. In November 2013, the United Nations Legal Counsel had signed the Headquarters Agreement for the Arusha branch of the International Residual Mechanism for Criminal Tribunals,[68] and in early 2014 he had visited the Extraordinary Chambers in the Courts of Cambodia.

7. One of the most significant challenges facing international criminal tribunals was their reliance on voluntary funding. Although the General Assembly had recently agreed to allow the Secretary-General to commit funds in 2014 in the event of voluntary funding falling short of the approved budget of the Extraordinary Chambers in the Courts of Cambodia,[69] the onus remained on the international community to ensure that the Chambers had enough funds to complete its judicial mandate. Many commentators held that it was conducting what was currently the world's most significant international criminal trial. Its premature collapse due to a lack of funds would be a tragedy for the victims and the people of Cambodia. The Extraordinary Chambers in the Courts of Cambodia had contributed to the development of international criminal justice through its system of civil party participation. Because it had a mixed team of international and national judges and prosecutors, it could well leave a lasting legacy of increased judicial capacity and greater respect for the rule of law.

8. In 2014, the Division for Ocean Affairs and the Law of the Sea would organize a number of activities to celebrate the twentieth anniversary of the adoption of the United Nations Convention on the Law of the Sea, to which 166 parties had acceded to date. The Office of Legal Affairs discharged depositary functions in relation to the implementation of the Convention and serviced the Meetings of States Parties to the Convention[70] and of the Commission on the Limits of the Continental Shelf.[71] The Commission on the Limits of the Continental Shelf had received a total of 71 submissions pertaining to the delineation of the outer limit of the continental shelf beyond 200 nautical miles from the baseline and had adopted 20

[66] Security Council resolution 2098 (2013) of 28 March 2013, para. 12 (*b*).

[67] See *Prosecutor* v. *Charles Ghankay Taylor*, Case No. SCSL-03-01-A, Judgment of 26 September 2013, Appeals Chamber, Special Court for Sierra Leone, para. 646.

[68] Agreement between the United Nations and the Government of the United Republic of Tanzania concerning the headquarters of the International residual mechanism for criminal tribunals, signed at Dar es Salaam on 26 November 2013, United Nations, *Treaty Series*, No. 51602.

[69] General Assembly resolution 68/247 B, of 9 April 2014, para. 7.

[70] Information on Meetings of States Parties to the 1982 United Nations Convention on the Law of the Sea is available from: www.un.org/depts/los/meeting_states_parties/meeting_states_parties.htm#contact.

[71] Information on the meetings of the Commission on the Limits of the Continental Shelf is available from: www.un.org/depts/los/clcs_new/clcs_home.htm.

recommendations on the subject. The General Assembly had continued to address the issues of the conservation and sustainable use of marine biological resources beyond national jurisdiction, the establishment of a regular process for global reporting and assessment of the state of the marine environment, including socioeconomic aspects and sustainable fisheries. The next meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea would discuss the role of seafood in global food security.

9. In the past year, two treaties, the Minamata Convention on Mercury and the Intergovernmental Agreement on Dry Ports, had been deposited with the Secretary-General. The Treaty Event in 2013 had been the occasion for 60 signatures and 49 consents to be bound by treaties.[72] In 2014, the Treaty Event would highlight 40 treaties on subjects such as human rights, terrorism, criminal law and the environment. The Treaty Section regularly responded to queries from States and international organizations with regard to final clauses of treaties or intergovernmental processes to draft or amend treaties.

10. In his work as head of the Office of Legal Affairs, he was continually reminded of the relevance of the Commission's work, which was as rigorous as it was thorough, enabling it to carry out its statutory mission productively and efficiently. He assured the Commission that it had, in his Office, a friend and an advocate.

11. The CHAIRPERSON thanked the United Nations Legal Counsel for his statement and invited members to ask him questions.

12. Mr. MURPHY asked whether the United Nations Legal Counsel could encourage Governments to provide comments on the Commission's approach to the topics it was considering. He also wished to know whether it would be useful for the Commission to devise guidelines for peacekeepers or to provide guidance on the basic rules underpinning the practice of administrative tribunals of international organizations. Perhaps the Commission could promote greater interaction with the Sixth Committee by holding one half-session per quinquennium in New York.

13. Mr. DE SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that in his bilateral conversations with representatives of Member States, he tried to encourage them to submit more comments on the Commission's work.

14. He would be interested to hear the Commission's thinking on the legal issues raised by the "robust" peacekeeping mandates being accorded by the Security Council and on their consequences in terms of international humanitarian law. Given that there were some theoretical and conceptual flaws in the case law of the internal justice system of the United Nations, the Commission could also help in filling the gaps in that system.

15. His preliminary research indicated that holding half of the Commission's session in New York once every five years was not feasible owing to lack of availability of conference services there during the usual dates of the Commission's sessions.

16. Mr. PETRIČ pointed out that the lack of financial support for Special Rapporteurs made it hard for members from developing countries to propose their services in that capacity. Would the adoption of the Kampala amendments to the Rome Statute of the International Criminal Court[73] lead to greater interaction between the Security Council and the Court and promote the Statute's universal application? It might be useful for the Office of the Legal Counsel to look into the international legal situation in the Arctic.

17. Mr. DE SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that the entry into force of the Kampala amendments would help to turn the International Criminal Court into a truly jurisdictional institution, strengthen its independence and increase its powers. There was, however, still a long way to go before the amendments entered into force, and it was by no means certain that they would promote the Statute's universal application. His Office rarely dealt with matters concerning the Arctic. Lastly, concerning financial support for Special Rapporteurs, he said that the Organization had to operate within the financial resources granted to it by Member States.

18. Mr. HMOUD said that the authorization to use force outside the scope of self-defence might have practical negative consequences for the protection of peacekeepers under international law and international humanitarian law. The Security Council should therefore be careful when making such authorizations, such as the authorization to use force given to the Intervention Brigade[74] that was part of MONUSCO. One key issue was the distinction between the Brigade, whose members were considered combatants under international humanitarian law, and the other personnel of MONUSCO who, as peacekeepers and non-combatants, retained protection under the law.

19. On another matter, he inquired about the opinion of the United Nations Legal Counsel on the idea that the United Nations established "national courts" in areas of conflict or in the so-called "failed States" to assume the responsibility of adjudication for crimes that fell below the level of international crimes.

20. Mr. DE SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that the logical consequence of mandates authorizing the use of force by peacekeeping forces was that they were subject to international humanitarian law and could themselves be considered legitimate targets of military action. However, in his personal view, "robust" mandates were nonetheless a positive development, since they were vital in enabling peacekeeping forces to operate effectively.

[72] "Treaty Event 2013: Towards Universal Participation and Implementation", available from: https://treaties.un.org, *Treaty Events*.

[73] Amendments on the crime of aggression to the Rome Statute of the International Criminal Court, Kampala, 11 June 2010, United Nations, *Treaty Series*, No. 38544.

[74] See Security Council resolution 2098 (2013) of 28 March 2013, para. 9.

21. As to the prosecution of grave international crimes, it was certainly unreasonable to expect failed States to be able to establish special criminal courts to deal with such complex proceedings. However, other means were available to achieve the objective of prosecuting such crimes, such as the fight against impunity.

22. Responding to a question from Mr. GÓMEZ ROBLEDO, he said that no consideration was currently been given to updating the 1999 guidelines on observance by United Nations forces of international humanitarian law.[75]

23. Mr. KITTICHAISAREE asked whether the United Nations Legal Counsel could foresee the Office of Legal Affairs playing a more constructive role with respect to the situation in the Syrian Arab Republic. In light of the recent failure of diplomatic efforts in the Syrian crisis, he wondered whether it would be possible for the Office to elaborate a road map of the actions permissible under international law.

24. Mr. DE SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that the Office of Legal Affairs had recently been accused of a lack of flexibility in its interpretation of the need for the consent of the Government of the Syrian Arab Republic to allow the delivery of humanitarian assistance within its territory. In the current state of development of international law, however, such consent was required even in the event of grave violations of international humanitarian law, however regrettable that might be. It was difficult to adopt a progressive approach to international law while at the same time respecting established doctrine.

25. Responding to a question from Mr. CANDIOTI, he said that no actions were at present being undertaken to promote awareness, among the depositaries of treaties and national legal advisers, of the Guide to Practice on Reservations to Treaties.[76]

26. The CHAIRPERSON thanked the United Nations Legal Counsel for his informative and interesting statement and his replies.

Expulsion of aliens (*continued*) (A/CN.4/669 and Add.1, A/CN.4/670, A/CN.4/L.832)

[Agenda item 2]

Ninth report of the Special Rapporteur (*concluded*)

27. The CHAIRPERSON invited the Commission to resume its consideration of the ninth report on the expulsion of aliens (A/CN.4/670).

28. Mr. WISNUMURTI said that, from the comments and observations made in the Sixth Committee in 2012 and those submitted in writing, States appeared to have rather contradictory opinions on the topic. That was no surprise, as it touched on a number of sensitive issues.

29. In his view, the draft articles reflected the balance between the sovereign rights of a State and the rights of aliens present in its territory. However, the Commission should take into account the views of States on certain draft articles. For example, several States had observed that draft articles 6, 23 and 24 had expanded the scope of *non-refoulement* obligations, in effect unduly limiting State sovereignty and thus deviating from the provisions of widely accepted human rights treaties, national laws and case law. The Commission should review those draft articles and the commentaries thereto to see whether any adjustments and further clarification were in order.

30. As mentioned in paragraph 10 of the ninth report, some States held the view that the draft articles essentially represented progressive development rather than codification. In his opinion, that was an overstatement of the issue. He endorsed the Special Rapporteur's statement in paragraph 15 that the draft articles contained not only provisions reflecting the progressive development of international law on the topic, but also a considerable number of provisions reflecting the codification of well-established State practice. That approach was consistent with the Commission's mandate under its statute.

31. Since only a limited number of States had expressed their position as to the final form the draft articles should take, he agreed that it would be premature and misleading to indicate any prevailing trend. His preference was for a convention, since from the beginning of its mandate the Commission had been preparing draft articles well-suited for that purpose. Furthermore, the Commission's annual reports to the Sixth Committee had led to the gradual improvement of the draft articles, and he did not have the impression that States had expressed any objection to their general thrust.

32. The Commission must now make every effort to accommodate the relevant comments and suggestions made by States, make amendments to the draft articles and provide clarification in the commentaries, as necessary, in order to ensure that the draft articles to be adopted on second reading were even more acceptable to States.

33. Sir Michael WOOD said that the number and detail of the comments made in the Sixth Committee and submitted in writing bore witness to the great interest in what was a sensitive topic that continually gave rise to practical difficulties, requiring States constantly to review and change their legislation.

34. A major purpose of a second reading was to take account of the views of States and to allow Commission members to reconsider their positions. The Commission should aim to do everything to ensure States' widespread acceptance of its work by taking account of their comments, as far as possible, in the draft articles and commentaries.

35. Regarding the form of the Commission's output on the topic, he agreed that what mattered was not so much the label—draft articles, guiding principles—as the

[75] Secretary-General's bulletin, ST/SGB/1999/13.

[76] General Assembly resolution 68/111 of 16 December 2013, annex. The guidelines constituting the Guide to Practice on Reservations to Treaties adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2011*, vol. II (Part Three), chap. IV, sects. F.1 and F.2, pp. 37 *et seq.*

nature of the text. The Commission owed it to States and to all those who would use its text in the years to come to indicate clearly the status of the rules being formulated, through a general statement or specific statements on specific articles, for two reasons.

36. First, all States had detailed laws and regulations on expulsion; if a rule the Commission articulated was not actually reflected in national laws, then it should say so, or its reasoning might be criticized. Second, the issues at stake frequently came before national and regional courts that were not necessarily specialists in international law and needed to know what constituted *lex lata* and what was *lex ferenda*.

37. One possibility would be to explain such matters in a short general commentary, preceding the commentaries to the draft articles. Its purpose would be to introduce the draft articles, describe the Commission's methodology and explain its view on the status of the rules being advanced. Such a general commentary could explain that the Commission was aware of existing, detailed national laws on the topic, but that its work drew on a range of sources, including universal and regional treaties, as well as case law, in an effort to establish an international framework to guide States. It could also explain that the current form of the draft articles carried no implications for the final form—that would be decided by States. The general commentary could also emphasize that it had not been exclusively a codification exercise, and that the outcome of the topic was not necessarily intended to reflect existing rules of law; it aimed to assist States in adopting sound provisions that might be used in domestic law in order fully to respect the inherent dignity of the human being.

38. As to the wealth of comments and suggestions received from States and the European Union, he agreed with quite a number of them and hoped that members would be open to making appropriate changes to the draft articles and including clarifications in the commentaries. He welcomed the Special Rapporteur's emphasis on the importance of the commentaries and the fact that the draft articles needed to be read and interpreted together with them.

39. In conclusion, he invited the Commission to bear in mind the words of a former Commission member, Mr. Christian Tomuschat, who in a recent article had pointed out that the Commission was "not confining itself to codifying the content of the customary rules already in existence, but endeavouring to lay down additional rules in the discharge of the second limb of its general mandate, namely to promote progressive development of the law". In one respect, Mr. Tomuschat noted, the Commission had gone to the outer limits of what, under current political conditions, might be acceptable to the States subject to immigration pressure.[77]

40. Mr. CANDIOTI said that, generally speaking, he endorsed the Special Rapporteur's analysis of the comments and observations received from States. The Commission's overall approach to the topic thus far had involved two main players: the expelling State and the person being expelled. However, it had not considered the role of international cooperation for the States (expelling, transit, destination and of origin) affected by expulsion of aliens. It was through international cooperation that States would find acceptable solutions to the legislative, political, human rights and social problems arising from expulsion. Such matters should be addressed either in a commentary, or better still in a preamble to the draft articles, which would clarify their rationale, purpose and meaning, irrespective of the final form they would take.

41. Regarding the use of terms, although it was too late to change anything, he considered that the title of the topic was outdated and drew attention to the fact that current legislation, especially in the European Union, used less emotive terms, such as *éloignement* (removal).

42. The Commission seemed too concerned about the form of its work on the topic, when what was more important, particularly for international tribunals, was the quality. In that connection, he suggested that the Commission be guided not only by article 20 of its statute, which referred to the preparation of drafts in the form of articles to be submitted to the General Assembly, but also by article 22, which referred to the preparation of a final draft and explanatory report to be submitted with recommendations to the General Assembly, as well as by article 23, setting out what such recommendations might entail.

43. Mr. GÓMEZ ROBLEDO said that, throughout his work on the topic, the Special Rapporteur had maintained a balance between the sovereign rights of States and the requisite protection for persons subject to expulsion. The outcome of the work, to be decided by the General Assembly, would provide greater certainty with regard to expulsion procedures and ensure observance of minimum standards of protection. He endorsed the view expressed by the Special Rapporteur in paragraph 23 of his ninth report that both aliens lawfully present and unlawfully present in a State's territory should be included in the scope of the draft articles. However, as some States had commented, while the rights and obligations of aliens in terms of expulsion procedures differed, the minimum standards of protection provided should be the same. In that connection, he drew attention to Advisory Opinion OC-18/03 of the Inter-American Court of Human Rights, on the *Juridical Condition and Rights of Undocumented Migrants*, in which that Court stated that "the regular situation of a person in a State [was] not a prerequisite for that State to respect and ensure the principle of equality and non-discrimination" (para. 118). The Court also acknowledged, as did the Special Rapporteur in his ninth report, that the State was empowered to accord different treatment to persons lawfully and unlawfully present in its territory, provided that it upheld the principle of equality and non-discrimination. The Special Rapporteur had quite rightly explained that the only distinctions that could be made related to procedural rights but not to substantive human rights.

44. However, the inclusion of specific articles on the prohibition of the expulsion of refugees and stateless persons could pose problems for those States that did not recognize refugee status under the Convention relating

[77] C. Tomuschat, "Expulsion of aliens: the International Law Commission's draft articles", in G. Jochum, W. Fritzemeyer and M. Kau (eds.), *Grenzüberschreitendes Recht—Crossing Frontiers: Festschrift für Kay Hailbronner*, Heidelberg, C. F. Müller, 2013, p. 646.

to the Status of Refugees or other relevant instruments. In his view, the prohibition of the expulsion of refugees and stateless persons could be assimilated to *lex specialis* in relation to the general rules governing the expulsion of aliens. One possible way of reconciling the different positions of States on the matter might be the inclusion of a "without prejudice" clause. Although draft article 8 contained a clause along those lines, the *lex specialis* character of the legal instruments relating to refugees and stateless persons should be underlined.

45. The protection required in the expelling State had been dealt with well in the draft articles, which brought together the minimum standards under the different human rights systems. Although paragraph (1) of the commentary to draft article 26 explained that the procedural rights listed in paragraphs 1 to 3 of that draft article were applicable both to persons lawfully and unlawfully present in the territory of the expelling State, that should also be made clear in the text of the draft article. He therefore suggested that a sentence should be added to draft article 26 along the lines of the first sentence of draft article 1 on scope.

46. Lastly, regarding the final form of the Commission's work, he agreed with the Special Rapporteur that the Commission worked for the States and that they should decide on the future of the draft articles, but he did not agree with the statement in paragraph 71 of the ninth report that some of the suggestions received from States would diminish the scope of the final outcome of the Commission's work on an important and sensitive topic in a globalized world.

47. Mr. SINGH said that the draft articles adopted on first reading maintained a balance between the sovereignty of States and the protection of aliens based on international law and practice in a number of countries. Of particular importance was the requirement to apply minimum standards for the treatment of aliens and the prohibition of the use of expulsion in order to circumvent extradition procedures.

48. It was necessary to maintain the balance achieved following lengthy discussions, while taking into account the sometimes divergent views of States on various aspects of the topic. He supported the Special Rapporteur's position that the draft articles contained provisions reflecting not only the progressive development of international law but also the codification of well-established State practice. That was in line with the Commission's mandate, and it was not necessary to identify which articles represented codification and which progressive development. As to the form of the outcome of work on the topic, he agreed that it would be premature to take a decision at that stage and that States should have the last word.

49. Mr. PETRIČ expressed support for Mr. Candioti's suggestion that the need for cooperation among States involved in expelling an alien should be highlighted in a preamble to the draft articles.

50. Mr. KITTICHAISAREE said that in South-East Asia, only four States had ratified the Convention relating to the Status of Refugees. Although Thailand was not a signatory, for many years it had been harbouring asylum seekers from neighbouring countries, known as "illegal entrants", but had never recognized them as refugees. It had also allowed the Office of the United Nations High Commissioner for Refugees to set up a regional office. When the Commission reviewed the draft articles in light of comments from certain countries in South-East Asia, it should therefore be aware that there was some flexibility that made it possible to accommodate refugees. Perhaps the Commission should simply acknowledge that although refugee law was not recognized by several States, it was by a majority of States, and leave it at that. If its intention was for the outcome of work on the topic to take the form of a convention, it was unlikely that States that did not recognize refugee law would become parties to the instrument.

51. Mr. KAMTO (Special Rapporteur), summing up the debate on his ninth report, said that nearly all the members of the Commission had found the draft articles to be useful and ready for referral to the Drafting Committee. One member had suggested inserting an introductory note to state that certain articles represented progressive development and others, codification of international law, and that the absence of any such indication regarding a particular article did not imply that this article constituted codification. He was unable to follow that suggestion, however. To do so would be extremely harmful, not only to the current draft articles, but also to all the past and future work of the Commission: any text that did not include such an indication would leave States and other users perplexed as to whether it reflected positive law, and which elements represented codification and which, progressive development.

52. Another member had suggested including an introductory statement to the effect that the Commission did not mean to suggest that the draft articles reflected or constituted the existing rules of law on the expulsion of aliens. Something similar had been done in the draft articles on the responsibility of international organizations,[78] but the Commission's decision in that case had been an exception to its usual practice and should remain so. In the present instance, the Commission was acting in accordance with its authoritative methodology and to do otherwise would be to send the wrong signal to States and other users of the Commission's work. Nevertheless, he was prepared to draft an opening general commentary setting out the aims of the draft articles, along the lines of the one contained in the articles on the responsibility of States for internationally wrongful acts.[79]

53. As to the suggestion regarding the inclusion of a general "without prejudice" clause, similar to the ones found in international human rights instruments, he was not opposed in principle. It was his understanding that Mr. Forteau, who had made the suggestion, was thinking of a clause similar to article 4 of the International

[78] See the draft articles on the responsibility of international organizations adopted by the Commission at its sixty-third session and the commentaries thereto in *Yearbook … 2011*, vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

[79] General Assembly resolution 56/83 of 12 December 2001, annex. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

Covenant on Civil and Political Rights and article 15, paragraph 1, of the European Convention on Human Rights. He therefore proposed adding a paragraph 2 to draft article 3, to read:

> "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, any State may take measures derogating from its obligations under the present draft articles to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

54. The commentary could make it clear that the situation envisaged was that of a war or similar exceptional threat.

55. With regard to the comments concerning draft article 15 on non-discrimination, he pointed out that it had to be considered in conjunction with draft article 3 (Right of expulsion) and draft article 4 (Requirement for conformity with law). For example, in the case of the expulsion of an alien by a State for violating the terms of a short-stay visa, draft article 15 could not be invoked, since the basis for expulsion was breach of conditions for admission. True, from the domain of expulsion, one then slipped into admission conditions; the rules on the two, although they were sometimes interrelated, were quite different.

56. Regarding draft article 24, one member had expressed the view that the Special Rapporteur had not understood a Government's comments on the Convention against torture and other cruel, inhuman or degrading treatment or punishment. However, he reaffirmed and reinforced his previous statements on the matter. Article 1 of the Convention only defined the term "torture" and gave no definition of the terms "cruel, inhuman or degrading treatment". Furthermore, no separate definitions of torture and cruel, inhuman or degrading treatment were to be found in any other legal instrument or in case law.

57. It had been further suggested that he had been critical of the comments by the United States to the effect that draft article 24 was based solely on jurisprudence of the European Court of Human Rights (*Selmouni* v. *France*) and a recommendation of the Committee on the Elimination of Racial Discrimination.[80] However, a global approach that made no distinction between torture and other cruel, inhuman or degrading treatment was not confined to European jurisprudence. For example, at the universal level, General comment No. 20 of the Human Rights Committee indicated that "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*".[81] At the regional level, the Inter-American Court of Human Rights in its judgment of 25 November 2004 in *Lori Berenson-Mejía* v. *Peru*, had said that "[t]he prohibition of torture and cruel, inhuman or degrading punishment or treatment is absolute and non-derogable" (para. 100 of the judgment). Furthermore, it was clear from the Convention against torture and other cruel, inhuman or degrading treatment or punishment that torture was necessarily an act of cruel, inhuman and degrading treatment, even though all acts of cruel, inhuman and degrading treatment were not necessarily torture, as article 16 of the Convention indicated.

58. Consequently, it was for the Commission to determine whether, notwithstanding consistent international and regional jurisprudence, it wished to reconsider the decision it had made in 2012 in order to capture the nuance arising from article 16 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment. If it did so wish, then new wording could be inserted in draft article 24, which would then read:

> "A State shall not expel an alien to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or to [equivalent] cruel, inhuman or degrading treatment or punishment [deemed to constitute torture]."

59. As to the final form of the Commission's work on the topic, he had a strong preference for draft articles. Indeed, it was that form which had guided his work and that of the Commission from the outset.

60. In conclusion, he requested the Commission to refer the draft articles to the Drafting Committee for the preparation of a final text to be transmitted to the General Assembly for consideration at its next session.

61. Mr. MURPHY thanked the Special Rapporteur for his accurate summary of the debate and said he wished to clarify the practice of the United States concerning the *non-refoulement* provision in article 3 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment.

62. Mr. KAMTO (Special Rapporteur) said that it was not the Commission's practice to reopen discussion following the summary of the debate by the Special Rapporteur.

63. The CHAIRPERSON said that he took it that the Commission wished to refer draft articles 1 to 32 to the Drafting Committee to take into account the comments and observations made during the debate.

It was so decided.

64. Mr. SABOIA (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of expulsion of aliens was composed of Mr. Candioti, Mr. Forteau, Mr. Gómez Robledo, Mr. Hmoud, Mr. Kittichaisaree, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Singh, Mr. Šturma, Mr. Vázquez-Bermúdez, Mr. Wako and Sir Michael Wood, together with Mr. Kamto (Special Rapporteur) and Mr. Tladi (*ex officio*).

The meeting rose at 1.05 p.m.

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[80] General recommendation No. 30 (2004) on discrimination against non-citizens, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 18* (A/59/18), chap. VIII.

[81] *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), annex VI, sect. A, para. 9.

3205th MEETING

Thursday, 15 May 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties[82] (A/CN.4/666, Part II, sect. A, A/CN.4/671,[83] A/CN.4/L.833[84])

[Agenda item 6]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited the Special Rapporteur to introduce his second report on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/671).

2. Mr. NOLTE (Special Rapporteur) said that the descriptive method used in relation to the current topic was conditioned by one of the core objectives, namely, to provide a repertory of interpretative practice. That objective was based on the nature of the process of interpretation described in articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties ("1969 Vienna Convention"), which did not prescribe hard and fast rules but instead required the interpreter to take different means of interpretation into account. The draft conclusions were indicative rather than prescriptive, and sought to clarify the role of subsequent agreements and subsequent practice as means of interpretation. His second report contained six draft conclusions that followed on from the first five. They ranged from the general to the particular, situated subsequent agreements and subsequent practice within the general framework of the rules on interpretation contained in the 1969 Vienna Convention and, in general, had been favourably received by States.

3. Draft conclusion 6 (Identification of subsequent agreements and subsequent practice) reminded interpreters that the identification of subsequent agreements and subsequent practice relevant for the purposes of interpretation under articles 31 and 32—a phrase not to be understood in the normative sense—required careful consideration, since it presented a number of difficulties. The subsequent agreements and subsequent practice that were taken into account must represent the assumption by a State of a position "regarding the interpretation of the treaty". Subsequent practice followed "in the application of the treaty" (art. 31, para. 3 (*b*)) or subsequent agreements regarding "the application of its provisions" (art. 31, para. 3 (*a*)), were specific forms of conduct relating to the interpretation of a treaty. Interpreters thus had to ensure the proper identification of those forms of interpretative conduct by determining, for example, whether a particular practice indeed related to the application of the treaty in question.

4. Draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation) concerned the possible effects of subsequent agreements and subsequent practice. Given that subsequent agreements and subsequent practice were two means of interpretation among others, and that international courts and tribunals assessed, on a case-by-case basis, the relevance of the various means of interpretation, subsequent agreements and subsequent practice might be used to narrow or widen the range of possible interpretations of a treaty compared to the results of the preliminary interpretation provided for in article 31, paragraph 1, of the 1969 Vienna Convention. Draft conclusion 7, paragraph 2, drew attention to the fact that the more specific the subsequent practice, the greater the interpretative value that seemed to be accorded to it under international case law. The paragraph was not, however, formulated in mandatory terms.

5. Draft conclusion 8 (Forms and value of subsequent practice under article 31, paragraph (3) (*b*)), which could perhaps be placed after draft conclusion 9 since it dealt with a more specific aspect of the topic, referred to the forms and the value of subsequent practice under article 31, paragraph 3 (*b*), of the 1969 Vienna Convention. The criteria it set forth could be used to identify the interpretative value of subsequent practice, but not all subsequent practice had to meet those criteria in order to qualify as such.

6. Draft conclusion 9 (Agreement of the parties regarding the interpretation of a treaty) set forth, in paragraph 1, the requirements for the agreement of the parties under article 31, paragraph 3 (*a*) and (*b*), of the 1969 Vienna Convention, without prejudice to the definition of the term "treaty" as a written agreement contained in article 2 of the Convention. In order to clarify the meaning of the term "agreement", which was used in other provisions of the Convention in the sense of a legally binding instrument, paragraph 1 of draft conclusion 9 stated that the agreement of the parties need not be binding as such. Draft conclusion 9, paragraph 2, reiterated the position expressed previously by the Commission, and which he had endeavoured to reflect in his second report, concerning the value to be attributed to silence on the part of one or more parties in certain circumstances. If necessary, the second sentence of paragraph 2 could become a new paragraph. Lastly, paragraph 3, which was aimed primarily at practitioners at the national level who were unfamiliar with certain usages at the international level, was intended to serve as a reminder that the objective of common subsequent agreements or common subsequent practice was not necessarily the interpretation of a treaty.

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[82] At its sixty-fifth session (2013), the Commission provisionally adopted draft conclusions 1 to 5 and the commentaries thereto (*Yearbook … 2013*, vol. II (Part Two), pp. 17 *et seq.*, paras. 38–39).

[83] Reproduced in *Yearbook … 2014*, vol. II (Part One).

[84] Mimeographed, available from the Commission's website.

7. Draft conclusion 10 (Decisions adopted within the framework of a conference of States parties) concerned the adoption of decisions that could result in a subsequent agreement or give rise to a subsequent practice within the framework of a conference of States parties to a treaty. The expression "conference of States parties", which did not appear in the 1969 Vienna Convention or in any other treaty of general application, described a meeting of States parties to a treaty for the purpose of reviewing or implementing that treaty. Its definition was provided in paragraph 1 for the purposes of the draft conclusions. Excluded from that definition were the organs of international organizations; the significance of their decisions under article 31, paragraph 3 (*a*) and (*b*), of the 1969 Vienna Convention would be considered in his next report. Since there was no requirement that an agreement between the parties under the aforementioned provisions take a particular form, there was nothing to prevent reaching such an agreement within the framework of a conference of States parties, unless the treaty provided otherwise. Paragraph 2 therefore stated that, under articles 31 and 32 of the 1969 Vienna Convention, the legal effect of a decision adopted within the framework of a conference of States parties depended on the terms of the treaty and the applicable rules of procedure. Paragraph 3 drew a necessary distinction between the substance (interpretative intention) and the form (unanimity or consensus) of a decision resulting from a conference of the States parties. An agreement under article 31 of the 1969 Vienna Convention could result only from a unanimous decision of a conference taken with the intention of interpreting the treaty, since the mere achievement of consensus could conceal disagreement on the part of some States as to its intended interpretation. On the other hand, the fact that the rules of procedure of a conference of States parties did not provide for its decisions to have binding effect did not, in itself, exclude the possibility for such decisions to constitute an agreement under article 31, paragraph 3, of the 1969 Vienna Convetnion since such agreements did not necessarily have to be legally binding.

8. Lastly, draft conclusion 11 (Scope for interpretation by subsequent agreements and subsequent practice) was intended to clarify the interpretative scope of subsequent agreements and subsequent practice. International courts and tribunals tended to arrive at rather broad interpretations of treaties, based on subsequent agreements or subsequent practice, while simultaneously considering whether the latter might have modified the treaty, thus inextricably creating a link between the two—interpretation and modification by means of subsequent agreements and subsequent practice. Nevertheless, they were entirely separate things, and the Commission's work remained focused on interpretation. A subsequent agreement between the parties to a treaty could modify the treaty if that agreement met the conditions set forth in article 39 of the 1969 Vienna Convention. However, whether an agreed subsequent practice could have the effect of modifying a treaty—something which States at the 1968–1969 United Nations Conference on the Law of Treaties had rejected, despite the Commission's proposal to that effect—had not yet been expressly and widely recognized in State practice or by international courts and tribunals. Consequently, draft conclusion 11 merely stated, in paragraph 1, that the scope for interpretation by subsequent agreements or subsequent practice might be wide. In paragraph 2, it said that, through a subsequent agreement or subsequent practice, the parties to a treaty were presumed to be intending to interpret the treaty, not to modify it. That solution made it possible to reconcile the reluctance to recognize that the informal practice of the parties could modify a treaty with the reality that the common practice of the parties was a preferred form of treaty application.

9. The CHAIRPERSON invited the members of the Commission to comment on the second report of the Special Rapporteur.

10. Mr. MURPHY noted that, in draft conclusion 6, the Special Rapporteur had omitted any reference to the position of the parties regarding the application of a treaty, and had referred only to the position they assumed regarding its interpretation, since he considered that every application of a treaty presupposed its interpretation. If that was the case, then the question arose why article 31 of the 1969 Vienna Convention referred explicitly to both. Moreover, it was a point that States at the United Nations Conference on the Law of Treaties had wished to include in paragraph 3 (*a*) of that article,[85] even though it had not featured in the initial set of draft articles prepared by the Commission in 1966.[86] The distinction between "interpretation" and "application" had originated in the work of Lord McNair, who had asserted that, if the meaning of a treaty was clear, the latter was applied and not interpreted: interpretation was a secondary process that came into play only when it was impossible to make sense of the treaty.[87] In other words, when the parties agreed on joint action in application of a treaty without any particular attention to refining the meaning of a treaty provision, it was their agreement on the application of the treaty that mattered, and not their agreement on its interpretation. It was in order to point that out that he proposed to include the phrase "or the application of its provisions". In fact, hundreds of treaty provisions accorded jurisdiction to a court for settling disputes relating to the interpretation *and* the application of a treaty, and the distinction between the two concepts had proved to be relevant for many decisions in that context. Admittedly, other scholarly writings took a position similar to that of the Special Rapporteur, but, in any case, it was not advisable to reject a distinction that was enshrined in the provisions of the 1969 Vienna Convention and confirmed by long-standing treaty practice.

11. As was the case in relation to other draft conclusions proposed by the Special Rapporteur, draft conclusion 6 referred to article 32 of the 1969 Vienna Convention. It was, of course, important to clarify that subsequent agreements and subsequent practice that did not fall within the scope of article 31 could fall within that of article 32; however, by referring to the two

[85] *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11, United Nations publication, Sales No.: E.68.V.7), 74th meeting, 16 May 1968, p. 442, para. 29.

[86] See the text of draft article 69 (which became article 31 of the 1969 Vienna Convention) in *Yearbook … 1966*, vol. II, document A/CN.4/L.117 and Add.1, p. 101 (paragraph 3 of article 69).

[87] A. McNair, *The Law of Treaties*, Oxford, Clarendon Press, 1961, p. 365, note 1.

articles too frequently, the Commission risked blurring the important distinction between them. It would be better simply to indicate in the commentary that the standards set in the draft conclusions, if they were not covered by article 31, might be relevant for the purposes of article 32—although it was uncertain that all of them were, in fact, relevant to an article 32 analysis.

12. Finally, rather than recommending "careful consideration" of the subsequent conduct of the parties in order to determine whether such conduct in fact concerned the interpretation of the treaty, it would be better to state directly that such conduct could not be established when the parties were motivated by other considerations. Accordingly, he proposed that draft conclusion 6 be reformulated to read:

> "Subsequent agreements and subsequent practice under article 31, paragraph 3, may not be established when the parties are motivated by considerations other than agreement regarding the interpretation of a treaty or the application of its provisions."

13. In connection with draft conclusion 7, the Special Rapporteur suggested that subsequent practice could show that there was some scope for the exercise of discretion in the application of a treaty provision. Nonetheless, it was important to explain in the commentary what was meant by the expression "scope for the exercise of discretion". The idea was that the exceptional and temporary non-implementation of a provision did not alter the general obligation arising therefrom and did not allow significant "scope for the exercise of discretion". Draft conclusion 7, paragraph 1, appeared to duplicate draft conclusion 11, paragraph 1, since both indicated that subsequent conduct could help to clarify the meaning of a treaty by narrowing or widening the range of possible interpretations. Paragraph 2 of draft conclusion 7 should be harmonized with draft conclusion 8, given that, as they currently stood, the two formulations made the value of subsequent practice as a means of interpretation conditional upon differing criteria. If nothing else, it would be preferable, in the case of paragraph 2, to replace the word "value" with "weight", which better reflected the idea of the assessment to be made as a function of the quality of the conduct.

14. With regard to draft conclusion 8, the Special Rapporteur explained in paragraph 42 of his second report that relevant subsequent practice included not only the externally-oriented conduct of a State but also its internal acts. It would be useful if such practice was understood to include written and oral pleadings before international courts, since those materials also reflected the views of the State with regard to the interpretation of a treaty. The title of the draft conclusion suggested that its text enumerated the forms of subsequent practice, but it actually stated only that such practice could take a "variety" of forms, mirroring the statement in draft conclusion 9 that subsequent agreements did not need to be arrived at in "any particular form". It was unnecessary to repeat that point. With regard to the criteria used to determine the value of subsequent practice, the Special Rapporteur had chosen to adopt the formula "concordant, common and consistent", whose origin was described in paragraph 47 of the second report. While consistency over time might carry greater or lesser weight for the purposes of interpretation, the fact that a practice was "concordant" and "common" could not vary by degrees. In that case, there could be no question of "extent": if the practice followed in interpreting a treaty was not common to the parties and concordant among them, it fell outside the scope of article 31, paragraph 3, of the 1969 Vienna Convention. That probably explained why most international courts and tribunals had not adopted the formula, and perhaps the Commission should not do so either.

15. The title of draft conclusion 9 appeared to collapse, under the term "agreement of the parties", the two distinct but interrelated concepts of a subsequent agreement regarding the interpretation of a treaty and the subsequent practice in the application of the treaty which established that agreement. Yet, it was advisable to continue to keep the two concepts separate, as the Commission had chosen to do in the title of the present topic. Paragraph 2 raised the question of the silence of a State in response to the unilateral interpretative declaration of another State. It would be useful to recall in that regard that such silence did not imply any general presumption of acceptance by the first State and could therefore not be construed as either assent or dissent, as the Commission had repeatedly emphasized in the Guide to Practice on Reservations to Treaties.[88] Reference should at least be made to the fact that, generally speaking, silence alone did not establish an agreement, even if, in a particular instance, it might be possible to find proof to the contrary. With regard to paragraph 3, it seemed more appropriate to move it to draft conclusion 6, which referred to the fact that the parties might be motivated by considerations other than interpretation of the treaty.

16. Concerning draft conclusion 10, it was important to maintain the distinction between conferences of States parties that reviewed the treaty's implementation and those that undertook a review of the treaty itself. Contrary to what was indicated in paragraph 83 of the second report, tacit acceptance and non-objection procedures were not generally described as "amendment" procedures; rather, they were often as "formal" as those according to which a State ratified an amendment. Among the examples of decisions of conferences of States parties that could be considered subsequent agreements within the meaning of article 31, paragraph 3 (*a*), of the 1969 Vienna Convention, the example of the guidelines for the implementation of article 14 of the WHO [World Health Organization] Framework Convention on Tobacco Control was not relevant, since the aim of the guidelines was not to clarify the interpretation to be given to article 14 but rather "to assist States parties in fulfilling their obligations" under article 14. The guidelines indicated that the definitions of terms were provided for the purposes of the guidelines.[89]

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[88] General Assembly resolution 68/111 of 16 December 2013, annex. The guidelines constituting the Guide to Practice on Reservations to Treaties adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2011*, vol. II (Part Three), chap. IV, sects. F.1 and F.2, pp. 37 *et seq.*

[89] WHO, "Guidelines for implementation of Article 14 of the WHO Framework Convention on Tobacco Control", in *WHO Framework Convention on Tobacco Control: Guidelines for Implementation: Article 5.3; Article 8; Articles 9 and 10; Article 11; Article 12; Article 13; Article 14*, 2013 edition. Available from www.who.int.

A better example would be decision No. BC-10/3, adopted in 2011 by the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.[90] Lastly, paragraph 1 of draft conclusion 11 could be merged with draft conclusion 7, as he had indicated previously.

17. Mr. FORTEAU welcomed the fact that the Special Rapporteur had cited the recent judgments handed down by the International Court of Justice in the *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening)* and the *Maritime Dispute (Peru* v. *Chile)* cases, even if the latter, which dealt with the interpretation of a tacit agreement and not a treaty, was not entirely relevant to the current topic. One could also cite the *M/V "Virginia G" Case (Panama/Guinea-Bissau)*, in which the International Tribunal for the Law of the Sea interpreted a treaty on the basis of subsequent practice, even if it did not refer to the customary rules of interpretation embodied in articles 31 and 32 of the 1969 Vienna Convention, which was regrettable.

18. With regard to the scope of the draft conclusions, it was doubtful whether it was appropriate to address issues related to the implementation of a treaty or its amendment when the topic under consideration related to the interpretation of treaties. He had strong reservations about draft conclusion 9, paragraph 3, and even stronger ones about draft conclusion 11, paragraph 2, in that it could not be presumed that subsequent agreements or subsequent practice had an interpretative rather than a modifying effect: that depended on the circumstances. The statement in the same paragraph that "[t]he possibility of modifying a treaty by subsequent practice of the parties has not been generally recognized" was not very convincing. In its advisory opinions issued in the case concerning *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)* and in the case concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice appeared to have recognized that subsequent practice could indeed result in amending a treaty.

19. With regard to the nature of the Commission's work, it was unclear whether the Special Rapporteur's objective was to draft a detailed guide to practice or conclusions that were somewhat normative in scope, even if one might question the latter of those hypotheses after reading certain draft conclusions that were of a purely descriptive, rather than prescriptive, nature. Thus, to say in draft conclusion 6 that the identification of subsequent agreements and subsequent practice required careful consideration was of little usefulness. As to the wording of paragraph 2 of draft conclusion 7, it left the reader at somewhat of a disadvantage, to say the least. To state that the value of a subsequent agreement or subsequent practice as a means of interpretation could depend, *inter alia*, on their specificity, was not very enlightening. The question was not whether the specificity of a subsequent agreement or subsequent practice *could* have an effect, but whether it *had* a legal effect, and whether that effect should be taken into account. One could, in fact, say the same about draft conclusion 10, paragraph 2. Useful additions, such as those mentioned in paragraph 22 of the second report, should therefore be made to those draft conclusions in order to give them greater normative force.

20. It was true that, from a legal standpoint, other draft conclusions were more robust, but, in such instances, it was their very normative nature that was problematic. Thus, one could question the validity of the three criteria proposed in the second sentence of draft conclusion 8, in view of the fact that international courts and tribunals had not limited themselves to those criteria. Rather, the criteria they had invoked included those of clarity and the uncontested or the long-standing nature of practice. In the *Peru* v. *Chile* case, for example, the International Court of Justice had given greater weight to practice that took place closer to the time of the conclusion of an agreement. One could argue, on a more fundamental level, that every case should be considered individually, that such an assessment related more to the system of evidence used than to the rules of interpretation, and that it would consequently be difficult to establish criteria in that area. In the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)*, the International Court of Justice had merely verified whether the practice established an agreement, without establishing the general criteria that had to be met in order to reach that conclusion. In addition, as the Special Rapporteur recalled, with the exception of the Dispute Settlement Body of the World Trade Organization (WTO), that was the usual approach adopted by international courts and tribunals—a trend that must be taken into account.

21. With regard to more specific questions of law, he continued to believe that treaty interpreters should consider subsequent agreements, within the meaning of article 31 of the 1969 Vienna Convention, to be binding. He did not think, after having carefully reread it, that the case law cited by the Special Rapporteur in his second report served to substantiate draft conclusion 9, paragraph 1. The commentary to draft conclusion 4, which had been adopted at the previous session, did not provide further clarification of the considerations underlying the Special Rapporteur's reasoning. In fact, it was difficult to understand how a court could not consider itself bound by an agreement between all the parties to a treaty on a particular interpretation of the treaty, including in situations in which such a subsequent agreement operated outside of the institutional procedures expressly established for the interpretation of the treaty. Thus, in its decision of 4 April 2012 in the case concerning *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, the WTO Appellate Body had first of all considered that the Doha Ministerial Decision[91] did not constitute a multilateral interpretation within the meaning of article IX, paragraph 2,

[90] See Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on its tenth meeting (UNEP/CHW.10/28), p. 31 *et seq*.

[91] WTO, "Ministerial decision on implementation-related issues and concerns", adopted on 14 November 2001, document WT/MIN(01)/17, in *The Doha Round Texts and Related Dcouments*, available from: www.wto.org/english/res_e/booksp_e/doha_round_texts_e.pdf.

of the Marrakesh Agreement Establishing the World Trade Organization.[92] It further considered that this Decision could indeed constitute a subsequent agreement within the meaning of article 31, paragraph 3, of the 1969 Vienna Convention,[93] basing its reasoning on the draft articles on the law of treaties and the commentaries thereto adopted by the International Law Commission in 1966.[94] According to the Appellate Body, any agreement "bearing specifically" on the interpretation of the treaty "should" be taken into account in its interpretation, given that, according to the aforementioned draft articles, such a subsequent agreement "must be read into the treaty for purposes of its interpretation".[95] It therefore seemed that the Special Rapporteur had relied on an overly broad view of the notion of "agreement", which blurred the distinction between the means of interpretation of article 31 and those of article 32, given that a non-binding obligation arose from article 32 but could not arise from article 31.

22. While he fully endorsed the Special Rapporteur's conclusion concerning the role of silence as a constitutive element of an agreement within the meaning of article 31, paragraph 3, of the 1969 Vienna Convention, he drew attention to the fact that, in the *M/V "Virginia G" Case (Panama/Guinea-Bissau)*, the International Tribunal for the Law of the Sea had found that the fact that there was "no manifest objection" to the legislation of several States concerning the bunkering of foreign vessels was evidence that such legislation was "in general, complied with" (para. 218 of the judgment). With regard to draft conclusion 6, it was doubtful whether one could address articles 31 and 32 of the 1969 Vienna Convention in the same way in that draft conclusion. It was far from being an established fact that what was asserted in the draft conclusion with regard to subsequent practice within the meaning of article 31 of the 1969 Vienna Convention also held for subsequent practice within the meaning of article 32. Lastly, contrary to what was indicated in its title, chapter VI of the second report was not devoted to the fundamental question of the interpretative scope of subsequent agreements and subsequent practice, which was dealt with in draft conclusions 7 and 8. In that respect, it was unclear what the difference was between the interpretative effect, value or scope—terms used in draft conclusions 7, 8 and 11—of subsequent practice, and he was of the view that those terms, which for the most part were equivalent, should be brought together in a single draft conclusion.

23. Mr. MURASE said that, since the merit of subparagraphs (*a*) and (*b*) of article 31 of the 1969 Vienna Convention lay largely in their ambiguity, which allowed States and international courts and tribunals a certain margin of flexibility, the Commission should endeavour to strike a proper balance between flexibility and clarity in formulating its draft conclusions. That was not an easy task, as evidenced by draft conclusions 6, 9 and 11, whose usefulness was far from self-evident. He even wondered whether it might not be better to adopt draft guidelines rather than draft conclusions, since the term "conclusion" was, in his view, too simplistic.

24. It was worrying that there was no reference in the draft conclusions to the element of time, which was essential. The Commission should therefore address the question of what the required length of time was for a treaty provision to qualify as subsequent practice. That could be done in draft conclusion 8. It was also important to have a clearer idea of when the interpretation of a treaty provision ended and when its implementation began.

25. It was doubtful whether conferences of States parties could be treated as if they were all the same. Since their powers and functions varied according to the multilateral treaty to which they corresponded, their relevance in terms of subsequent agreements and subsequent practice was far from uniform. It should be borne in mind that, owing to their nature, some treaty provisions could not be interpreted by means of subsequent agreements or subsequent practice. For that reason, it was important to insert in draft conclusion 10, paragraph 2, the phrase "depending also on the nature of the provision at issue" after "Depending on the circumstances" and the words "or may not" after the verb "may". Moreover, contrary to what was implied by draft conclusion 10, paragraph 3, a consensus could not always be equated with an "agreement"—a point that should be made in the commentary.

26. He also wished to address what appeared to be a contradiction in the judgment handed down by the International Court of Justice in the *Whaling in the Antarctic* case: for the purposes of the interpretation of article VIII of the International Convention for the Regulation of Whaling, the Court initially found that the resolutions and guiding principles of the International Whaling Commission concerning the use of non-lethal methods[96] were instruments that "cannot be regarded as subsequent agreement …, nor as subsequent practice" because they had been adopted without the support of all States parties to the Convention, in particular without the approval of Japan (paras. 83 and 137 of the judgment). However, the Court subsequently referred to "significant advances in a wide range of non-lethal research over the past 20 years" (para. 137 of the judgment). Lastly, he proposed that draft conclusions 7 (para. 2), 8 and 11, which partially overlapped, be reformulated. As to draft conclusion 4, which concerned the definition of subsequent agreements and subsequent practice, it should be placed before draft conclusion 3, which was a substantive conclusion.

The meeting rose at 12.40 p.m.

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[92] *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, para. 255.

[93] *Ibid*., para. 268.

[94] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, p. 221 (para. (14) of the commentary to draft article 27).

[95] *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, paras. 265 and 269.

[96] G. Donovan (ed.), Annex Y to the Report of the Scientific Committee: "Guidelines for the review of scientific permit proposals", *The Journal of Cetacean Research and Management*, vol. 3, Suppl. (June 2001), pp. 371–372; and G. Donovan (ed.), Annex P to the Report of the Scientific Committee: "Process for the review of special permit proposals and research results from existing and completed permits", *ibid.*, vol. 16, Suppl. (forthcoming April 2015), pp. 349–353. Available online from the website of the International Whaling Commission, https://iwc.int/documents.

3206th MEETING

Friday, 16 May 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*) (A/CN.4/666, Part II, sect. A, A/CN.4/671, A/CN.4/L.833)

[Agenda item 6]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. PARK said that the six new draft conclusions seemed to be of a fairly general and descriptive character. Since the Commission had to supply precise guidance to States, which were the first to interpret a treaty, some of the terminology employed in the draft conclusions should be amended or improved.

2. In draft conclusion 6, the phrases "requires careful consideration" and "whether they are motivated by other considerations" were rather ambiguous, as were the phrases "in particular by narrowing or widening" and "may, *inter alia*, depend on their specificity" in draft conclusion 7. In fact, he queried the contents of draft conclusion 7, given that the European Court of Human Rights was the only international court to limit itself to broad, comparative assessments of subsequent practice. Despite the inclusion of the words "may" and "*inter alia*", the second paragraph of that draft conclusion did not seem to reflect the diversity of international case law. It was doubtful whether specificity should be made a criterion for determining the value of subsequent practice.

3. With regard to draft conclusion 8, he said that if a given conduct was consented to by all States parties to a treaty, in line with article 31, paragraph 3, of the 1969 Vienna Convention, then it should be viewed as subsequent agreement, as opposed to subsequent practice. Subsequent practice within the meaning of article 31, paragraph 3, required a "concordant, common and consistent sequence of acts", as the WTO Appellate Body had stated (see paragraph 44 of the second report of the Special Rapporteur (A/CN.4/671)). However, the expression "concordant, common and consistent" required further scrutiny, since it was used only by the WTO Appellate Body.

4. With reference to draft conclusion 9, he was unsure whether the term "agreement", as used in article 31, paragraph 3 (*a*), of the 1969 Vienna Convention was identical in meaning to the sense in which it was used in paragraph 3 (*b*). The agreement referred to in article 31, paragraph 3 (*a*), required the existence of a "single common act" demonstrating the parties' agreement, whereas no single, common line of conduct was necessary for the agreement mentioned in article 31, paragraph 3 (*b*), where that term signified that subsequent practice had to be indicative of a "common understanding" among the parties. Draft conclusion 9 should therefore be amended and its title changed to "Agreement of the parties as referred to in article 31, paragraph 3 (*b*)". Another draft conclusion could be added, to state that the agreement referred to in article 31, paragraph 3 (*a*), meant a "single common act". The question then arose whether tacit agreement or acquiescence could be deemed agreement within the meaning of article 31, paragraph 3.

5. For draft conclusion 10, it might be wise to give further consideration to the roles of the different conferences of States parties and the legal effect of a decision adopted at such a conference, as mentioned in paragraph 2. The phrase "in the context of the interpretation of treaties" should be inserted in paragraph 2.

6. Chapter VI of the second report, especially paragraph 116 thereof, pinpointed the key issues: to what extent could subsequent agreements and subsequent practice under article 31, paragraph 3, of the 1969 Vienna Convention contribute to interpretation, and could subsequent agreements and subsequent practice have the effect of modifying a treaty? Many academic writers admitted that it was not always easy to draw a distinction between application and modification of a treaty. Article 39 of the 1969 Vienna Convention laid down a general rule on modification of a treaty, namely that it could be amended by agreement between the parties concerning its interpretation or application. Thus, a treaty could be modified by subsequent agreement among the parties concerning its interpretation or application.

7. While that line of research being pursued by the Special Rapporteur was promising, draft conclusion 11, as currently worded, lacked clarity. It should be reworded to deal separately with the role of subsequent agreements, on the one hand, and with the role of subsequent practice, on the other. The contents of paragraph 1 added no additional guidance or information and were therefore superfluous. In paragraph 2, a distinction was made between modification of a treaty and conduct by which the parties "intended to interpret" a treaty, the distinction being whether or not the conduct was consistent with the treaty provisions governing modification. It was the substance, not the form of conduct, that was important. Subsequent practice resulting in a fundamental change in a treaty was a *de facto* modification and not an interpretation of that treaty. The Drafting Committee would have to discuss whether paragraph 2 should reflect the fact that subsequent practice, as a *de facto* modification, brought about an essential change in a treaty.

The meeting rose at 10.30 a.m.

3207th MEETING

Tuesday, 20 May 2014, at 10 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*) (A/CN.4/666, Part II, sect. A, A/CN.4/671, A/CN.4/L.833)

[Agenda item 6]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission members to pursue their consideration of the second report on subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/671).

2. Ms. ESCOBAR HERNÁNDEZ said that while article 31, paragraph 3 (*a*) and (*b*), of the 1969 Vienna Convention distinguished between the interpretation and the application of a treaty, as Mr. Murphy had noted, the Special Rapporteur assumed that every application of a treaty presupposed its interpretation, because States parties had to adopt a position on the matter. That statement seemed simplistic given all the situations that could arise in practice. States often automatically or mechanically applied a treaty provision without it being possible to identify in that application any of the characteristic elements of the logical process implied by the interpretation of a rule. On other occasions, they developed some of the treaty's provisions through subsequent practices or subsequent agreements that could not be considered an interpretation of the treaty, but rather an application, or even a modification thereof. Therefore, the assertion in the final sentence of paragraph 5 of the second report did not seem to be sufficiently substantiated.

3. The Special Rapporteur constantly placed article 32 on the same level as article 31, paragraph 3, although at its previous session the Commission had accepted the principle that subsequent practice which did not fall within the scope of article 31 could be deemed to fall within that of article 32.[97] Several members, including herself, had highlighted the differences between those two types of practice; hence draft conclusion 1 dealt with each category separately, in paragraphs 3 and 4. That distinction, which was well founded, must be maintained. The Drafting Committee should therefore carefully review the proposed draft conclusions, in particular draft conclusions 6, 7 and 10.

4. The Special Rapporteur sometimes used a very broad notion of practice that included the practices of some non-State actors. She was, however, uncertain whether it was always true that, as paragraph 6 of the second report stated, that the concept of "application" did not exclude practices by non-State actors which the treaty recognized as forms of its application and which were attributable to one or more of its parties. For example, while the practice of the International Committee of the Red Cross (ICRC) regarding the repatriation of prisoners of war, the subject of paragraphs 16 to 18 of the second report, apparently illustrated that contention, another, perhaps more accurate, interpretation might be that it was an instance of conduct on the margins of the treaty through which the parties accepted a condition to which a third party made its cooperation subject, without conferring any legal effects on the practice. Moreover, the practice of ICRC could not be considered either a practice by a party to the treaty, because ICRC was not such a party, or a non-State practice which could be attributed to one or more parties to the treaty.

5. In addition, the report of the Special Rapporteur seemed to be slipping towards issues that were not within the scope of the topic, in particular the question of the modification of treaties, which the Commission had agreed, after a lengthy debate, to leave outside of the scope of its work. Nor did it seem necessary to address the matter of the modification of a treaty by subsequent agreement or by subsequent practice in chapter VI of the second report, because that issue did not fall within the scope of the topic under consideration. In that regard, Ms. Escobar Hernández noted that in paragraph 15 of the report, the Special Rapporteur held that the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 was aimed at influencing the interpretation of that Convention. Not only was that argument difficult to defend, particularly in light of article 4, paragraph 1, of the Agreement, it was also likely to create confusion as to the nature of that instrument which, despite its title, was an agreement amending the Convention, the clear purpose of which was the modification of the latter's provisions, rather than its interpretation or application.

6. As Mr. Forteau had noted, the rather general and sometimes imprecise and ambiguous nature of some phrases in the draft conclusions was inconsistent with the rigour of the second report. If the Commission wished to propose an instrument that would be useful to States, it must draft precise, unambiguous texts and commentaries. Similarly, the systematic nature of the draft conclusions made it impossible to move from the general to the more specific, contrary to the Commission's decision at its previous session[98] and the Special Rapporteur's statement when he presented his second report,[99] and it gave rise to repetitions that should be avoided, perhaps by reviewing the systematic approach itself.

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[97] *Yearbook … 2013*, vol. II (Part Two), p. 20, para. (9) of the commentary to draft conclusion 1.

[98] *Ibid.*, para. (12) of the commentary to draft conclusion 1.

[99] See the 3205th meeting above, p. 33, para. 2.

7. While she subscribed to the idea underpinning draft conclusion 6—namely the importance of the will of the parties to a treaty regarding the meaning that they wished to assign to an agreement or practice in order to interpret the treaty—she thought that its wording, which was too descriptive and vague, should be reviewed and its title, which did not reflect its content, should be amended. Draft conclusion 7, paragraph 1, treated subsequent agreements and subsequent practice under article 31 and subsequent practice under article 32 of the 1969 Vienna Convention as if they were a single issue, whereas it would be preferable to consider them separately in two different draft conclusions, or, better still, to insert a new paragraph. In paragraph 2, while she had no preference for either "value" or "weight", it would be wise to clarify the meaning of the term chosen in the commentary. On the other hand, she considered that the phrase *inter alia* was of little use.

8. The use of the word *acuerdo* with two different meanings in the Spanish version of draft conclusions 8 and 9 was likely to cause confusion. Given that subsequent agreements and subsequent practice did not have an identical meaning in article 31, paragraphs 3 (*a*) and (*b*), of the 1969 Vienna Convention, it would be better not to deal with them together in draft conclusion 9, even though, in both cases, a shared will (or agreement) among States had to be identified. In that respect, she was pleased to note that the Special Rapporteur had considered silence to be a possible form of expressing that agreement, but it would be preferable to move paragraph 2 of draft conclusion 9 to draft conclusion 8. With regard to paragraph 3, which should be inserted into draft conclusion 7, she wondered whether the reference to temporary non-application was appropriate; further consideration should be given to its possible interpretation as a way of effecting the suspension of a treaty, which was covered by specific rules in the 1969 Vienna Convention.

9. As far as draft conclusion 10 was concerned, she drew attention to the use in the Spanish version of the expression *acuerdo sustancial* ("agreement in substance"). She feared that this expression, which appeared for the first time in paragraph 3, raised doubts as to whether that agreement differed from the "common agreement" (*acuerdo común*) mentioned in other provisions, and she proposed its deletion because it did not seem to be of any additional value. It would, however, be advisable expressly to mention the term "consensus" and to explain its meaning in the context of interpreting a treaty, because that was the concept most likely to cause difficulties for the national legal institutions responsible for interpreting international treaties.

10. Lastly, with regard to draft conclusion 11, which duplicated provisions found in other draft conclusions, paragraph 1 should be included in draft conclusion 7 and paragraph 2 in draft conclusion 6. The reference to modifying a treaty should also be deleted. In conclusion, she was in favour of referring all the draft conclusions to the Drafting Committee.

11. Mr. TLADI said that, while it was indeed difficult to imagine that the application of a treaty would not require its prior interpretation, the final sentence of paragraph 5 of the second report seemed too much like a reinterpretation of the 1969 Vienna Convention, a step which the Commission had expressly agreed to avoid. It was necessary to clarify the idea that the concept of application did not exclude practices by non-State actors, particularly having regard to draft conclusion 5, paragraph 2, which had been adopted at the previous session.

12. Some provisions of the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, particularly those contained in annex IV, concerning section 3, could not be considered a form of subsequent practice *regarding* the interpretation of the 1969 Vienna Convention. The practice of ICRC could not be deemed State practice either. With reference to chapter II of the second report, he observed first that the possible effects of subsequent conduct varied according to whether it was "in application" or "regarding the interpretation" of the treaty and whether it established the agreement of the parties as to its interpretation, and, second, that those effects also depended on the relationship of the practice or agreement with the text, context, object and purpose of the treaty in question. The Commission had already determined that article 31, paragraph 3, of the 1969 Vienna Convention was part of the general rule of interpretation.[100] In his opinion, that provision constituted part of the general rule in that it helped to determine the meaning of the terms of the treaty, in good faith, in their context and in light of the treaty's object and purpose, or else it facilitated that determination. The consequences of subsequent practice and subsequent agreements were therefore inextricably linked to the means of interpretation established by article 31, paragraph 1. Similarly, while in paragraph 33 of his report, the Special Rapporteur suggested that the scope of a provision was modified by subsequent practice, in reality, as subsequent practice had confirmed, the specific interpretation that he quoted as an example could be explained by the application of article 31, paragraph 1, of the 1969 Vienna Convention, namely interpretation "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose".

13. He wished to know why, in paragraph 27 of his second report, the Special Rapporteur had stated that article 31, paragraph 1, accorded the object and purpose of a treaty importance, "but not an overriding importance", but had not applied that qualifier to the other elements of the general rule. Although it was perhaps true that, as noted in paragraph 73 of the second report, an agreement between parties under article 31, paragraph 3 (*a*) and (*b*), could come to an end or another agreement could replace it as a means of interpretation, caution should be exercised in assessing the weight to be accorded to those successive subsequent agreements. The acceptance of different, or even contradictory, successive practices or agreements as being equally as probative as authentic means of interpretation might suggest that treaties lacked objective content and that their meaning shifted according to the short-term interests of States. A clear distinction should therefore be drawn between the consequences of subsequent practice and subsequent agreements for the interpretation of treaties and other possible effects. It might well be that parties agreed not to apply a provision, or

[100] *Yearbook … 2013*, vol. II (Part Two), pp. 19–20, para. (8) of the commentary to draft conclusion 1.

to apply it with a twist. However, if that twist departed markedly from the text, context, object or purpose of the treaty, it might be something other than treaty interpretation. Lastly, the question of treaty modification did not fall within the scope of the topic under consideration.

14. In conclusion, although it was tempting to rely on the case law of the European Court of Human Rights, which was often very progressive, in the context of treaty interpretation it was essential to determine whether the Court used subsequent practice in the same sense as in article 31, paragraph 3, of the 1969 Vienna Convention or for some other purpose. Subject to those reservations, he was in favour of referring the draft conclusions to the Drafting Committee.

15. Mr. KAMTO said that although most of the proposed draft conclusions were well founded, the Special Rapporteur's approach to some aspects of subsequent practice was problematic. For example, he did not share the opinion that an "agreement" under article 31, paragraph 3, "need not necessarily be binding". That was the complete opposite of what had been said in paragraphs 67 and 68 of the judgment of the International Court of Justice in the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)*. Acceptance that a subsequent agreement within the meaning of article 31, paragraph 3 (*a*), or resulting from subsequent practice within the meaning of article 31, paragraph 3 (*b*), might not be binding would be tantamount to introducing a new category into the law of treaties that had no basis in either the 1969 Vienna Convention or, more generally, in international law. It would be best to disregard that possibility, which, in any case, as other speakers had noted, fell outside the scope of the topic, especially if the view were taken that subsequent practice could have the effect of modifying a treaty.

16. He welcomed the fact that the second report dealt with the issue of silence, which was currently considered to be a legal act in some circumstances and under certain conditions. He personally had unsuccessfully recommended that it be taken into consideration during the Commission's work on unilateral acts. He therefore invited the Special Rapporteur to carry out an in-depth study of acquiescence, estoppel and the parties' awareness of their agreement, a matter which had been touched on too briefly, because in his opinion those two essential elements were what gave silence normative authority.

17. Draft conclusion 6 was confined to generalities. It would be more useful to list the identification criteria, which could be drawn for example from the case law of the International Court of Justice, in particular from the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)*. He proposed the deletion of paragraph 1 from draft conclusion 9 and the referral of paragraphs 2 and 3 to the Drafting Committee, which should review their wording. The definition of a conference of States parties set forth in draft conclusion 10, paragraph 1, raised several questions, in particular, that of the difference between the "reviewing" and the "implementing" of a treaty. Furthermore, it would be helpful to indicate in paragraph 2 that the "applicable" rules were those of the conference of States parties and to specify the circumstances in which the decision of such a conference could constitute a subsequent agreement under article 31, paragraph 3 (*a*). In order to avoid the suggestion that such a decision could also be imposed on States that had not supported it, or that had abstained, it could be specified that the agreement in question was between "States parties that expressed support for the decision". What was said in draft conclusion 11, paragraph 2, might apply to subsequent practice, but not to subsequent agreements. In principle, he was opposed to the possibility of modifying the treaty by means of subsequent practice, but if the Commission were to tackle that issue in the context of the topic under discussion, it should be extremely cautious and strictly limit that possibility, because it stretched the formal review procedure provided for in all treaties. Subject to those comments, he approved of the referral of draft conclusions 6 to 11 to the Drafting Committee.

18. Mr. ŠTURMA said that the nature of the subject called less for articles and guidelines than the drafting of conclusions which, even if essentially descriptive, would be useful for interpreters of treaties. It was indeed tempting and in accordance with the Commission's mandate to draw up normative conclusions, but caution was required for at least two reasons. First, the inherent flexibility of article 31, paragraph 3, must be preserved, as some members had emphasized, even if a certain degree of precision was vital. Second, the debate during the plenary meeting at the previous session had shown that most members believed that the draft conclusions must not depart from the 1969 Vienna Convention, either in content, or in their terms. As for the question of whether the Commission should focus on subsequent agreements and subsequent practice under article 31 or, on the contrary, adopt a broader approach, he thought that although caution was appropriate, it should not be excessive. Thus, instead of confining itself to article 31, it would be better for the Commission to analyse all the possible roles that subsequent agreements and subsequent practice could play in the interpretation of a treaty.

19. With regard to the controversial issue of subsequent agreements the object of which was not to interpret a treaty, but to amend it, while it might be interesting to attempt to draw a clearer distinction between the interpretative and modifying effects of subsequent agreements and subsequent practice, it was necessary to remain within the scope of the topic, namely the interpretation of treaties.

20. Although they were descriptive in nature, draft conclusions 6 and 7 were useful because they reflected State practice and international jurisprudence. The issues of the form of subsequent practice and its value, or weight, should perhaps be treated separately, rather than together as they were in the current draft conclusion 8. Draft conclusion 9 correctly stated that a subsequent agreement under article 31 need not necessarily be binding as such, but it did not state whether a non-binding agreement carried less weight than a binding agreement—which was certainly the case. Lastly, draft conclusion 10 was acceptable as it stood, since it indicated sufficiently clearly that the effect of a decision adopted within the framework of a conference of States parties depended primarily on the treaty and the applicable rules of procedure.

The meeting rose at 11 a.m.

3208th MEETING

Wednesday, 21 May 2014, at 10 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*) (A/CN.4/666, Part II, sect. A, A/CN.4/671, A/CN.4/L.833)

[Agenda item 6]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the second report of the Special Rapporteur on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/671).

2. Mr. GÓMEZ ROBLEDO, referring to draft conclusion 6, said that an unduly sharp distinction must not be made between subsequent agreements and subsequent practice, since the two concepts were not completely distinct. In fact, it was clear from article 31, paragraph 3 (*b*), of the 1969 Vienna Convention, which identified relevant practice as "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", that those concepts were closely linked. Placing them in genuinely distinct categories might actually make it more difficult to determine the relevance of practice in the interpretation of a treaty. Rather, such a determination should focus on whether practice reflected a pre-existing agreement on the manner in which a treaty should be interpreted, or clarified other reasons which accounted for a particular interpretation. Analytical efforts should centre on determining the forms that practice must take for it to be considered relevant for the purposes of the interpretation of a treaty.

3. With regard to draft conclusion 9, he agreed that subsequent agreements need not take a particular form nor be binding under international law, since the 1969 Vienna Convention contained no requirement to that effect. Whether there was tacit agreement in certain cases was often difficult to determine, and the appropriate criterion should be that used by the International Court of Justice in the *Kasikili/Sedudu Island (Botswana/Namibia)* case, namely evidence of awareness and acceptance of the agreement by the parties.

4. Chapter V of the second report, on decisions adopted by conferences of States parties, offered truly promising material for analysis. Like the Special Rapporteur, he thought that the legal effect of such decisions depended on both their content and their form. Consensus was a necessary but not a sufficient element in determining whether such decisions were subsequent agreements for the purposes of interpreting a treaty. However, reaching consensus on the exact meaning of the term "consensus" was no easy matter, since it had been variously understood to mean unanimity, an overwhelming majority and the adoption of a decision without a vote. Fortunately, in its judgment in the case concerning *Whaling in the Antarctic*, the International Court of Justice had at least delineated the way in which consensus differed from unanimity.

5. It would also be pertinent to consider the value of resolutions issued by bodies established under the constituent instruments of international organizations. In particular, the agreements reached on a dynamic and ongoing basis within the United Nations system could shed light on the evolution of a number of provisions of the Charter of the United Nations. Although the International Court of Justice had ruled on the value of those resolutions in various advisory opinions, there was still scope for assessing their usefulness in interpreting the obligations of Member States. The same applied to other international organizations of a universal character.

6. Turning to chapter VI of the second report, on the scope of subsequent agreements and subsequent practice as a means of interpretation, he said he did not agree with all of the reasoning therein. The reasoning began with the decision in the *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*, in which the International Court of Justice had held that the subsequent practice of the parties could result in a departure from the original intent of the treaty on the basis of a tacit agreement. But the Court's logic was taken to extreme lengths with the suggestion, in paragraph 117 of the report, that under certain circumstances, a treaty might be modified by the subsequent practice of the parties.

7. In paragraph 165 of his second report, the Special Rapporteur referred to a comment made by the Commission, many years earlier, that the line between interpretation and amendment of a treaty by subsequent practice might be blurred.[101] On the contrary, the line was by no means so tenuous, since the subsequent practice of the parties was merely one of the elements in the general rule of interpretation set out in article 31 of the 1969 Vienna Convention. Moreover, the second report showed that it was only in decisions of arbitral tribunals that a treaty was seen to be susceptible to modification by the practice of parties. The majority of the international courts considered subsequent practice as providing an evolutive interpretation of a treaty.

8. Thus, in contrast to the notion that a treaty could be modified by subsequent practice, a more reasonable approach would be an evolutive interpretation of the obligations of the parties, using the combined application

[101] *Yearbook … 1964*, vol. II, document A/CN.4/167 and Add.1–3, p. 60 (para. (25) of the commentary to article 71 of the draft articles on the law of treaties).

of all the elements of the general rule of interpretation. The operation would involve, not modifying a treaty, but rather clarifying the scope of its application and the substantive scope of its provisions.

9. He recommended that all the draft conclusions be referred to the Drafting Committee.

10. Mr. NIEHAUS said that he supported the proposal made by Mr. Murase at a previous meeting to replace the term "conclusion" with "guideline". The former term referred only to an outcome, while the latter reflected more clearly the nature of the text being prepared by the Special Rapporteur.

11. With regard to draft conclusions 6 and 7, he agreed with the Special Rapporteur and other speakers that they were descriptive rather than prescriptive in nature. As such, they served to clarify and enhance the understanding of the topic.

12. In his opinion, the ambiguity in draft conclusion 6 noted by Mr. Park stemmed from the overly broad term "other considerations", but that ambiguity could be removed by specifying clearly the types of considerations concerned. Although the phrase "concordant, common and consistent" used in draft conclusion 8 was perfectly clear, it would nonetheless be desirable to use a single term encompassing all three characteristics and indicating that subsequent practice must not deviate from the central purpose of the treaty.

13. With regard to draft conclusion 9, which addressed the core requirements for the agreement of the parties on the interpretation of the treaty, he said that in order for silence to be understood as constituting acceptance of subsequent practice, the requisite circumstances, described in paragraph 2 of the draft conclusion, must be present.

14. It was true that a conference of States parties, as defined in the first paragraph of draft conclusion 10, did not include those States attending a conference as members of an organ of an international organization, but the text should be reworded for ease of comprehension. Similarly, in the second paragraph, it should be made explicit that the phrase "applicable rules of procedure" referred to the rules of procedure of the conference.

15. As to draft conclusion 11, he proposed deleting the first paragraph, since it reiterated what was stated in other draft conclusions. The second paragraph should be expanded to give fuller treatment to a complex and contentious subject.

16. He wished to join with other members who had emphasized the importance of referring to the temporal element. The question of the time needed for subsequent agreements or subsequent practice to be consolidated was a fundamental one requiring careful consideration.

17. Lastly, he recommended that all six draft conclusions be referred to the Drafting Committee.

18. Mr. HMOUD said that the Commission should take care not to reinterpret or amend the rules set out in the 1969 Vienna Convention, including the general rule on interpretation. It must remain within the confines of the topic and not deviate from the understanding reached in 2012, when the format of the topic had been changed.[102] Despite the obvious difficulty in distinguishing between the interpretation of treaties and their modification through subsequent practice, it would be counterproductive to address the topic solely from the standpoint of its relationship to the rules on interpretation.

19. He agreed with the premise that a careful factual and legal analysis of the positions of the parties regarding the interpretation of a treaty was necessary. Through their subsequent agreement or subsequent practice, the parties had to create a common position regarding a certain interpretation in order for it to produce legal effects. However, the parties must be aware that the position was held in common in order to fulfil the requirements of article 31, paragraph 3, of the 1969 Vienna Convention.

20. Although draft conclusion 7, paragraph 1, reflected the fact that subsequent agreements and subsequent practice could widen or narrow the interpretation of a term, the text should emphasize that they were means or tools of interpretation that did not override the ordinary meaning of the term.

21. With regard to draft conclusion 8, it should be stressed that subsequent practice under article 31, paragraph 3 (*b*), must establish an agreement between the parties regarding its interpretation, not merely reflect a common understanding. The practice in question had to reach a certain intensity or frequency in order to determine its weight or value. He agreed with the standard set by the WTO Appellate Body for the value of subsequent practice, namely that it should be concordant, common and consistent,[103] so long as it purported to determine the intention of the parties regarding agreement on the interpretation.

22. In draft conclusion 9, the statement that an agreement under article 31, paragraph 3 (*a*) and (*b*), did not need to be binding as such, was worrying. The fact that the United Nations Conference on the Law of Treaties had replaced the expression "understanding" with the word "agreement"[104] meant that such an agreement had to produce legal effects in order to be taken into account as an authentic element of interpretation. He did not see the value of underlining the nature of an agreement under article 31, paragraph 3 (*a*) and (*b*), of the 1969 Vienna Convention, as binding or otherwise: it was likely simply to create confusion for interpreters of treaties. Despite the argument in paragraph 74 of the second report that a disagreement between the parties regarding the interpretation of the treaty would not normally replace the original subsequent agreement, what mattered most was that, in order to constitute an agreement under article 31, paragraph 3, of the 1969 Vienna Convention, the parties to a treaty had

[102] See *Yearbook … 2012*, vol. II (Part Two), p. 77, paras. 226–227.

[103] *Japan—Taxes on Alcoholic Beverages II*, pp. 12 *et seq.*, sect. E.

[104] *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11, United Nations publication, Sales No.: E.68.V.7), 74th meeting, 16 May 1968, p. 442, para. 29.

not only to have a common understanding of a position regarding the interpretation of the treaty, but also to accept that position. It was that interrelationship between awareness of a position and its acceptance by all the parties that should be emphasized in draft conclusion 9.

23. While acceptance, or more precisely acquiescence, could be deduced from silence in some circumstances, the Commission had to be careful about highlighting that point. A State party might, for political reasons, choose not to object or react to a certain practice by another State party or parties, but that must not be seen as acquiescence to the practice. In order for such silence or lack of reaction to constitute an authentic means of interpretation, it must have been preceded by an awareness of such a practice, an awareness that could not be derived from the mere availability of the relevant information in the public domain. Account also had to be taken of awareness gained by notification through the appropriate official and diplomatic channels.

24. As to draft conclusion 10, he agreed with the proposition in paragraph 94 of the second report that only decisions of conferences of States parties that were intended to produce legal effects were pertinent as subsequent agreements under article 31, paragraph 3 (*a*), of the 1969 Vienna Convention. He likewise agreed that consensus reached in a conference of States parties did not imply unanimity or agreement on substance but was merely a procedural arrangement. In order for such consensus to be considered subsequent agreement under article 31, paragraph 3 (*a*), all the elements of a duly and specifically established agreement needed to be present, including acceptance by the parties of the substance of the interpretation.

25. Lastly, he said that although the line between the modification and evolutive interpretation of a treaty might be blurred, the issue of amendments to treaties fell outside the scope of the present topic and required a separate and thorough study. Despite the inference to the contrary in paragraph 144 and subsequent paragraphs of the second report, an amendment to a treaty by agreement between the parties under article 39 of the 1969 Vienna Convention was a process that required the application of the substantive and formal rules contained in Part II of that Convention. The many examples contained in the Special Rapporteur's second report showed that the issue of the amendment or modification of a treaty by means of subsequent agreements or subsequent practice had not been settled (see paragraphs 117 *et seq.*). The proposal made at the United Nations Conference on the Law of Treaties to allow for the modification of a treaty through subsequent practice had been defeated by an overwhelming majority of votes;[105] it could therefore not be inferred that the Convention was merely silent on the matter. Although draft conclusion 11, paragraph 2, had been referred to as descriptive, it might nevertheless lead to a normative proposition, opening up the prospects of misuse and misinterpretation.

26. He recommended referring the draft conclusions to the Drafting Committee.

27. Responding to a comment by Mr. TLADI about the understanding of the nature of agreement, binding or otherwise, suggested in draft conclusion 9, paragraph 1, he said his point had been that the Commission should not refer explicitly to the binding or otherwise nature of subsequent agreements, because doing so risked creating confusion in terms of the application of the rules of interpretation.

28. Mr. FORTEAU said that the term "agreement" in article 31, paragraph 3 (*a*) and (*b*), of the 1969 Vienna Convention denoted a specific concept under international law that should be distinguished from the non-binding instruments which could be used as means of interpretation under article 32. The Commission was currently divided on the question of how to define the term "interpretative agreement", and a more detailed and in-depth study of that concept was needed.

29. Mr. KAMTO said he agreed with those who felt that the term "agreement", within the meaning of article 31 of the 1969 Vienna Convention, could not be understood in any way other than as binding. Whether it was an interpretative agreement or *a fortiori*, an agreement to modify a treaty, it was inconceivable that it could be considered non-binding. Indeed, nothing could qualify as an agreement unless it was binding, and all the case law cited by the Special Rapporteur in his second report confirmed that point.

30. Mr. SABOIA said that a subsequent agreement regarding the interpretation of a treaty that had the effect of modifying that treaty, and essentially amending it, had to follow the formal rules for amendment laid down in the 1969 Vienna Convention.

31. Mr. HMOUD said that, to the extent that a subsequent agreement regarding the interpretation of a treaty had to produce legal effects in order to be considered an authentic means of interpretation, it constituted a binding agreement.

32. Sir Michael WOOD said that, in a recent work edited by the Special Rapporteur and cited in the second footnote to paragraph 49 of the second report, James Crawford stated that "[i]nternational law says that the parties to a treaty own the treaty and can interpret it".[106] That statement illustrated the importance of the role played by subsequent agreements and subsequent practice as part of the general rule of interpretation. The Commission's work might help to correct the misconception that article 31, paragraph 1, of the 1969 Vienna Convention alone provided the general rule of interpretation.

33. One of the themes emerging from the Commission's work was a focus on the interpretative value of a "common understanding" of the parties in the process of treaty interpretation—a formulation that appeared to reflect a return to earlier language. On the subject of language, he himself still held out hope that he could convince the Special Rapporteur and others that "elements of interpretation" was preferable to "means of interpretation".

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[105] *Yearbook … 1966*, vol. II, draft article 38, p. 236, and *Official Records of the United Nations Conference on the Law of Treaties, First Session …* (A/CONF.39/11) (see previous footnote), 38th meeting, 25 April 1968, p. 215, para. 60.

[106] J. Crawford, "A consensusalist interpretation of article 31(3) of the Vienna Convention on the Law of Treaties", *in* G. Nolte (ed.), *Treaties and Subsequent Practice*, Oxford University Press, 2013, pp. 29–33, at p. 31.

34. As to the discussion on whether the work on the topic should be descriptive or normative, in his view, it should be both. Mr. Tladi had suggested that the Special Rapporteur might be criticized for being too descriptive. However, an essentially descriptive set of draft conclusions would be of interest. The Special Rapporteur had referred to the draft conclusions as "practice pointers"; if they gave direction to interpreters of treaties, then that fact alone made them helpful. The present form of the Commission's outcome—that of draft conclusions—remained an appropriate description of the aim of its work.

35. Another theme emerging from the Commission's work was the need to retain the distinction between the general rule of interpretation in article 31 of the 1969 Vienna Convention and the supplementary means of interpretation in article 32. The two should not simply be dealt with together, as they were in some of the draft conclusions, since the role of practice in article 32 was quite distinct. Sir Michael hoped that the Commission would review and revise paragraph (3) of the commentary to draft conclusion 1, which appeared to suggest that any recourse to preparatory work was limited by preconditions. That seemed to ignore the important distinction made in the Convention between the unqualified use of preparatory work to confirm meaning and its conditional use to determine meaning. It was only the use of supplementary means to determine the meaning of a treaty that was subject to preconditions.

36. On draft conclusion 6, he shared the view of other speakers that an appropriate reference to the application of the provisions of a treaty should be included and that the Commission should not depart from the 1969 Vienna Convention in that respect. Although it had been formulated as guidance for the interpreter, draft conclusion 6 actually seemed to be directed more towards identifying an interpretative nexus between the subsequent agreement or subsequent practice and the treaty. He did not find the expression "assume a position regarding the interpretation" to be particularly clear. Nor did the phrase "or whether they are motivated by other considerations" add much. Instead, it invited a difficult investigation into the motivation of treaty parties; he therefore proposed to delete it. There appeared to be an overlap between draft conclusion 6 and draft conclusion 9, paragraph 3, and it might be preferable to put all the guidance on the identification of relevant subsequent agreements and practice in one place.

37. Draft conclusion 7 might appear to state the obvious, but it was useful and could be improved. Draft conclusion 8 helped to clarify subsequent practice. Sir Michael agreed that a good test for the value of subsequent practice as a means of interpretation was whether it was "concordant, common and consistent", but he would suggest adding the word "clear" to the end of that list.

38. Regarding draft conclusion 9, which provided helpful interpretations of article 31, paragraph 3 (*a*) and (*b*), of the 1969 Vienna Convention, he shared Mr. Hmoud's concern about the phrase "need not … be binding". It seemed to give the wrong emphasis, particularly since the term "binding" was not used in the Convention.

39. Draft conclusion 10 concerned the relevance of the acts of the parties to a treaty, which were distinct from yet similar to the acts of States within international organizations. It might be preferable to move the contents of draft conclusion 10 closer to the draft conclusions on international organizations; Mr. Gómez Robledo had made some interesting remarks in that respect. He endorsed Mr. Murase's comments on draft conclusion 10, comments which could be considered in the Drafting Committee.

40. Regarding draft conclusion 11, he endorsed Mr. Hmoud's words of caution about entering into the field of treaty amendment, but thought that the Special Rapporteur had actually adopted a fairly cautious approach. Nevertheless, the end of paragraph 2 could be refined by the Drafting Committee, and there was an important point of terminology: the second report tended to refer to "modification" of a treaty, yet in the 1969 Vienna Convention, "modification" was carefully distinguished from "amendment". Thus, in the first sentence of paragraph 2, the word "modify" should be replaced with "amend". In conclusion, he agreed that all the draft conclusions should be referred to the Drafting Committee.

41. Mr. VÁZQUEZ-BERMÚDEZ said that, as Mr. Murase had rightly observed, the temporal factor was important for the interpretation of treaties. Efforts to establish the intention of the parties formed part of the initial stage, covering the period from the negotiations on the treaty until its adoption. At that stage, the important elements for interpretation were the preparatory work and the circumstances in which the treaty was concluded. At the subsequent stage, following the adoption and entry into force of the treaty, the important elements for interpretation were subsequent agreements on its interpretation and application and subsequent practice on its application, establishing the agreement of the parties regarding the interpretation. He shared the concerns of Mr. Murphy and Ms. Escobar Hernández, among others, as to how the Special Rapporteur had dealt with the two distinct concepts of interpretation and application of the treaty. In the draft conclusions and corresponding analyses, those two concepts should be kept separate, as they were in article 31, paragraph 3 (*a*) and (*b*), of the 1969 Vienna Convention.

42. As far as multilateral treaties were concerned, in some cases, conferences of States parties had adopted guidelines explicitly described as to be used for the implementation of the treaty, while in other cases, it had been stipulated that the guidelines must not be understood as interpreting a treaty, their aim being to facilitate its implementation by giving practical guidance. The case mentioned by the Special Rapporteur in paragraphs 157 and 158 of his second report had, in his own view, been an agreement regarding the implementation of the Convention: its purpose had not been to determine or clarify the meaning of the instrument's provisions.

43. Referring to the statement in paragraph 78 of the second report that a conference of States parties was a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, he observed that the establishment of a conference of States parties, or any other intergovernmental body, did not have to be expressly provided for in a treaty; States parties

themselves could decide on such matters. For example, many years after the adoption of the 1970 Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property, the States parties had decided, in 2002, to establish the Meeting of States Parties[107] and had then adopted, in 2012, its Rules of Procedure.[108]

44. He agreed with the Special Rapporteur that as the owners of the treaty, States parties could reach agreement regarding its interpretation and that the agreement need not necessarily be reached on the basis of consensus.

45. Mr. Hmoud had mentioned the Commission's proposal, rejected by the United Nations Conference on the Law of Treaties, to include a provision in the 1969 Vienna Convention allowing for the modification of treaties by subsequent practice. However, practice and case law gave very little justification for asserting that such a procedure now formed part of customary law. He himself was of the opinion that the matter did not fall within the scope of the topic under consideration and required separate and thorough analysis.

46. He shared the Special Rapporteur's view that the weight that subsequent agreement should be given within the interpretative process, which was a single combined operation, depended on all the elements in the process and on the specific case at hand.

47. The CHAIRPERSON, speaking as a member of the Commission, said that the steady growth in the number of treaties in a wide variety of spheres accounted for a renewed interest in the interpretation of treaties. He endorsed the comments made about the rather general nature of the draft conclusions, which gave rise to concern about the implications for their implementation in practice. The outcome of work on the topic should be a set of clear guidelines for the professionals who were constantly dealing with the interpretation and application of international treaties.

48. Regarding the text of the draft conclusions and the reasoning behind them, he endorsed the approach proposed by the Special Rapporteur in draft conclusion 6, but was not entirely convinced of the "value added" of a separate draft conclusion. After all, article 31, paragraph 3 (*a*) and (*b*), of the 1969 Vienna Convention could be applied only to those subsequent agreements and subsequent practice that reflected the parties' common understanding of the treaty.

49. The advisability of referring to both article 31, paragraph 3, and article 32, of the 1969 Vienna Convention in draft conclusions 6 and 7 was doubtful. A clearer distinction should be drawn between the primary and supplementary means of treaty interpretation set out in those two articles.

50. He had difficulty with the statement in paragraph 5 of the second report that conduct in the application of the treaty was only an example, albeit the most important one, of all acts regarding the interpretation of a treaty. True, the application of international treaties was inextricably linked to their interpretation. Yet the two should remain separate, because the purpose of interpretation was to clarify the meaning of the text, whereas application entailed determining the consequences arising for the parties, or for third parties in certain circumstances.

51. He had no objection to draft conclusion 7, paragraph 1, as long as the original intention of the parties was preserved even after the range of possible interpretations of the treaty was narrowed or widened by subsequent agreements and subsequent practice. If that was not the case, the draft conclusion would give too much leeway for the interpretation of the treaty, which could lead to infringements.

52. Concerning paragraph 2 of the draft conclusion, he queried the choice of specificity as the criterion for determining the value of subsequent agreements and subsequent practice. Was that really the most important element in treaty interpretation? According to draft conclusion 8, on the other hand, the value of subsequent practice as a means of interpretation depended on the extent to which it was concordant, common and consistent. In support of that formulation, the Special Rapporteur referred to a decision of the WTO Appellate Body.[109] However, one example was hardly sufficient to corroborate the proposed approach. It was true that subsequent practice should be concordant, common and consistent, otherwise it could not demonstrate common agreement among the parties. Nevertheless, the Commission might wish to think again about whether the approach proposed by the Special Rapporteur was advisable.

53. Concerning draft conclusion 9, he said that all the parties should be involved, in so far as possible, in subsequent practice. Invoking the tacit consent of the parties to existing practice was acceptable, as long as they were aware of such practice and did not have their own practice supporting a different understanding of the treaty. The question just raised by some members as to whether an agreement was binding should be dealt with separately.

54. Regarding draft conclusion 10, he said that a conference of States parties was the most appropriate mechanism for coordinating the positions of the parties to a treaty with regard to their understanding and application of its provisions.

55. He expressed doubts about the proposition put forward in draft conclusion 11. Although he endorsed the statement in paragraph 116 of the second report that the dividing line between the interpretation and the modification of a treaty was in practice often difficult to determine, the two processes must be kept separate, since they

[107] United Nations Educational, Scientific and Cultural Organization (UNESCO), "Decisions adopted by the Executive Board at its 165th session (Paris, 7–17 October 2002)", document 165 EX/Decisions, point 6.2, decision 9 (*b*), p. 26. Available from: http://unesdoc.unesco.org/images/0012/001280/128093e.pdf.

[108] UNESCO, "Meeting of States Parties to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO, Paris, 1970), Rules of Procedure", adopted on 22 June 2012. Available from: www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/1970_MSP_Rules_Procedure_2012_en.pdf.

[109] *Japan—Taxes on Alcoholic Beverages II.*

had completely different legal consequences. The 1969 Vienna Convention was based on the notion that the original intentions of the authors of treaties were expressed primarily in the texts of treaties, and it was up to those who interpreted treaties to elucidate those intentions. The International Court of Justice had repeatedly emphasized that the interpreter's task was not to review treaties or to bring up things they did not contain.

56. The Special Rapporteur's conclusion that the possibility of modifying a treaty by subsequent practice was not generally recognized was, in many respects, justified. Nevertheless, if it was recognized in a specific case that a treaty had been modified by subsequent agreements and subsequent practice, such agreements should be considered, not as a means of interpretation under article 31, paragraph 3, of the 1969 Vienna Convention, but as agreements on amendments under article 39 of that Convention. If, when applying the treaty, the need arose for an evolutive interpretation through subsequent agreements and subsequent practice, it was an indication that the treaty needed to be reviewed. Updating a treaty through the formal process of amendment would then clarify the text and reflect the changes in the parties' understanding of their obligations since the time of signature.

57. In conclusion, he agreed that the draft conclusions should be referred to the Drafting Committee.

The meeting rose at 11.40 a.m.

3209th MEETING

Thursday, 22 May 2014, at 10 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*) (A/CN.4/666, Part II, sect. A, A/CN.4/671, A/CN.4/L.833)

[Agenda item 6]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the Special Rapporteur on subsequent agreements and subsequent practice in relation to the interpretation of treaties to summarize the debate on his second report (A/CN.4/671).

2. Mr. NOLTE (Special Rapporteur) said that he had endeavoured to formulate the draft conclusions as normatively as possible, but that the diversity of international jurisprudence and State practice made it difficult to identify very clear rules. However, there were some patterns from which general conclusions could be derived that would help interpreters. Such help might consist of describing the approach adopted by the international courts and tribunals when confronted with subsequent agreements and practice. For example, the way in which the International Court of Justice dealt with the issue provided important guidance for the interpreter. The proposed draft conclusions were thus not purely descriptive. In order to avoid any misunderstandings, the Commission might prefer to call the draft text "guidelines", as proposed by Mr. Niehaus and Mr. Murase.

3. The proposal to distinguish more clearly the role played by articles 31 and 32 of the 1969 Vienna Convention was acceptable, provided that the principle of the unity of the process of interpretation was preserved and that reference was made to article 32 where necessary. It could also be pointed out, as proposed by Sir Michael Wood, that article 32 was applicable not only in a subsidiary fashion but also systematically in order to confirm the meaning resulting from the application of article 31.

4. With reference to draft conclusion 6, Mr. Murphy had expressed the view, based on considerable research, that application and interpretation were two entirely separate and distinguishable operations. However, many examples could be cited to show that, on the contrary, the two operations overlapped to some extent, and therefore the interpreter's attention was simply drawn to the fact that application of a treaty always involved some degree of interpretation. He supported Mr. Murphy's proposal to emphasize more clearly the content of article 31, paragraph 3 (*a*), which pushed the interpreter more towards agreements that were happening on the ground, as well as Mr. Forteau's proposal to specify that a subsequent agreement or subsequent practice might serve not only to clarify the terms of the treaty but also other means of interpretation, such as the object and purpose of the treaty. It might also be possible to find a better expression than "other considerations" at the end of the draft conclusion, as suggested by Mr. Niehaus.

5. Draft conclusion 7 repeated the content of article 31 of the 1969 Vienna Convention for the very purpose of explaining it in more detail. The other criteria cited by Mr. Forteau could be mentioned, but it would be difficult to take the further step of concluding, as Mr. Forteau had proposed, that the specificity of a particular practice always had significant value for the purpose of interpretation. Mr. Hmoud's proposal to indicate that practice should be specific to the treaty seemed to go in the right direction, however. The references to specificity, value and form could also be merged in one draft conclusion. The Drafting Committee should also consider the proposal by Mr. Murphy and Ms. Escobar-Hernández to replace the word "value" with "weight".

6. As far as draft conclusion 8 was concerned, he agreed that the formulation "concordant, common and consistent" was perhaps excessively prescriptive. He would propose new wording that would also take account of Mr. Hmoud's proposal that practice should be sufficiently

frequent. The rules on the burden of proof could also be addressed, given that it was closely linked to the value of a subsequent agreement or subsequent practice, as had been noted by Mr. Forteau.

7. Several members had taken issue with the proposition made in draft conclusion 9—although it was based on the commentary to draft conclusion 4 that had already been adopted by the Commission—to the effect that a subsequent agreement under article 31, paragraph 3 (*a*), of the 1969 Vienna Convention need not be binding. If subsequent agreements had necessarily to be binding, the Convention would have attributed them stronger legal force. The report of the WTO Appellate Body on the *United States—Measures Affecting the Production and Sale of Clove Cigarettes* case, also mentioned by Mr. Forteau, had not stated that in order to be qualified as a subsequent agreement the Doha Ministerial Declaration needed to be binding, but that it clearly expressed a common understanding and was not merely hortatory.[110] Furthermore, there was no indication that the Commission or the States assembled at the United Nations Conference on the Law of Treaties had considered a subsequent agreement under article 31, paragraph 3 (*a*), of the 1969 Vienna Convention to have a different legal effect than an agreement established by virtue of subsequent practice. Of course, the interpreter was bound to "take into account" subsequent agreements or subsequent practice; however, that obligation did not derive from the necessarily binding nature of subsequent conduct, but from the Convention itself. Mr. Kamto had rightly noted that, in the *Kasikili/Sedudu Island (Botswana/Namibia)* case, cited in the second report to highlight the need for parties to reach an agreement on the interpretation of a treaty, the International Court of Justice had not confirmed that a subsequent agreement must not be binding. Conversely, it had not expressed the position, in that case or any other, that agreements must be binding. In order to conclude what appeared to be a false debate, perhaps the formulation proposed by Mr. Hmoud could be used, namely that an agreement under article 31, paragraph 3, of the 1969 Vienna Convention produced legal effects and, to that extent, it was binding.

8. Mr. Park and Mr. Murphy had quite rightly raised the question of whether a distinction should be made between agreements under article 31, paragraph 3 (*a*), and under article 31, paragraph 3 (*b*), of the 1969 Vienna Convention, but that distinction had already been made in draft conclusion 4 and its accompanying commentary. The purpose of draft conclusion 9 was to identify what the two paragraphs had in common, namely the agreement between the parties regarding the interpretation of the treaty. With regard to silence, it did not seem appropriate to explore the concepts of estoppel, preclusion and prescription, as proposed by Mr. Kamto. The proposal by Mr. Murphy and Sir Michael Wood to move paragraph 3 of draft conclusion 9 to draft conclusion 6 should be examined.

9. As the general thrust of draft conclusion 10 had been supported, he proposed that the Commission consider the issue of parties to treaties establishing international organizations, raised by Sir Michael, at a later date. Mr. Murase and Mr. Park had made the point that, as conferences of States parties operated under different rules, they could not be treated as a single category. In order to take account of that very diversity, the primacy of the applicable rules of procedure was recognized in subparagraph 2 and a broad definition of the term "conference of States parties" was used in subparagraph 1. As proposed by Mr. Murase, it could perhaps be explained that the interpreter had ample room to take into account specific provisions governing the operation of a conference of States parties when assessing the effect of a decision it had taken. He questioned the appropriateness of making a distinction, as proposed by Mr. Murphy, between conferences specially charged with assessing implementation of a treaty and those undertaking a review of the treaty itself. A treaty was not necessarily interpreted expressly, but could be interpreted implicitly during its implementation. The doubts expressed by Ms. Escobar Hernández with regard to the expression "agreement in substance" in subparagraph 3 did not seem justified, as the importance of the distinction between the form and the substance was grounded in international case law. The Commission might wish to consider the possible effects of decisions of conferences of States parties beyond their contribution to the interpretation of a treaty, as proposed by Mr. Gómez Robledo, provided that it did not stray from the topic. The fact that some conferences of States parties, such as the Conference of the Parties to the United Nations Framework Convention on Climate Change, did not operate under rules of procedure should be highlighted more clearly.

10. Some members had expressed doubts as to whether draft conclusion 11 fell within the scope of the project, while others believed, on the contrary, that it was necessary to address the question of a possible modification of a treaty by a subsequent agreement or by subsequent practice. He had taken care to formulate the draft conclusion so that it fell within the scope of the topic, namely the interpretation of treaties; however, the distinction between interpretation and modification arose frequently in practice and should thus be brought to the interpreter's attention. The possible effect of the intention to modify or amend the treaty on the scope and range of possible interpretations should be examined, referring if necessary to the possibility of an evolutive interpretation, as proposed by Mr. Gómez Robledo. As draft conclusions 7, 8 and 11 were closely connected, the Drafting Committee might consider merging some of their provisions.

Protection of the atmosphere[111] (A/CN.4/666, Part II, sect. I, A/CN.4/667[112])

[Agenda item 11]

First report of the Special Rapporteur

11. The CHAIRPERSON invited Mr. Murase, Special Rapporteur on the protection of the atmosphere, to introduce his first report (A/CN.4/667).

[110] *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, para. 267.

[111] At its sixty-third session (2011), the Commission included the topic in its long-term programme of work (*Yearbook … 2011*, vol. II (Part Two), p. 175, para. 365, and annex II). At its sixty-fifth session (2013), the Commission included the topic in its programme of work and appointed Mr. Shinya Murase Special Rapporteur for the topic (*Yearbook … 2013*, vol. II (Part Two), p. 78, para. 168).

[112] Reproduced in *Yearbook … 2014*, vol. II (Part One).

12. Mr. MURASE (Special Rapporteur) recalled that, while the inclusion of the topic in the Commission's programme of work had been strongly supported by a number of States in the Sixth Committee, other delegations had expressed doubts as to its feasibility owing to the highly technical and politically sensitive nature of the topic in light of ongoing negotiations in that area. In order to address those concerns, the Commission had agreed to include the topic subject to an "understanding";[113] however, there was nothing to prevent it from discussing issues that were not being dealt with in any political negotiations or from examining existing treaty practice from the perspective of customary international law, particularly as it would not seek to fill the gaps in specialized treaties by proposing a set of draft articles. Furthermore, since the effectiveness of the mechanisms established by those treaties was relative and varied depending on the region, the difficulties faced in applying those treaties should be identified. Consequently, the Commission's objective should be to elaborate non-binding draft guidelines. Some States, however, had expressed the view that a redefinition of the 2013 "understanding" would be unavoidable at a later stage of the project. In any case, the choice of topic was appropriate because the protection of the atmosphere was a pressing concern for the international community and there was abundant evidence of State practice; moreover, it was essentially a legal issue, which meant that the Commission would not be at risk of interfering in the political domain. Far from being ill suited to deal with issues of special regimes, the Commission was in fact best placed in the United Nations to address those issues from the perspective of general international law and thus to avoid the fragmentation of international law. In addition, on the basis of article 16 (*e*) of its statute, the Commission could consult with scientific organizations and individual experts, which it had already done.

13. As to the background provided in chapter I of his first report, the Special Rapporteur recalled that the arbitral award made in 1941 in the *Trail Smelter* case had laid the foundations of the law in relation to transboundary air pollution. Since the 1980s, the legal framework in relation to the protection of the atmosphere had been supplemented by the Convention on long-range transboundary air pollution, as well as other multilateral instruments dealing with different aspects of the deterioration of the atmosphere, particularly tropospheric transboundary air pollution, stratospheric ozone depletion and climate change. However, no convention covering the protection of the atmosphere as a whole had been concluded to date, despite efforts to that end by the intergovernmental conference held in Ottawa in February 1989[114] and the growing recognition of the law of the atmosphere by the international community over the past 30 years.

14. The law relating to the protection of the atmosphere was based both on specialized conventions and on a variety of international case law, ranging from the *Trail Smelter* case to the *Whaling in the Antarctic* case and the *Nuclear Tests (Australia* v. *France)* and *Nuclear Tests (New Zealand* v. *France)* cases, which had given rise to the possibility of recognizing an *actio popularis* in that area. Other sources included non-binding instruments and domestic legislation and case law. Those sources were important in determining whether the rules and principles relating to the protection of the atmosphere were established customary law and thus ripe for codification or emergent customary law, in which case the Commission would work on its progressive development.

15. The draft guidelines proposed in the first report were general in nature and contained definitions. They were thus preceded by a description of the physical characteristics of the atmosphere, together with diagrams, which highlighted the fragility of the atmosphere and its importance for human survival as a limited, scarce natural resource. The movement of the atmosphere around the Earth—atmospheric circulation—inevitably resulted in the dispersion of airborne substances, particularly pollutants and greenhouse gases, and made the atmosphere a fluctuating and dynamic mass, which meant that it could not be treated in same way as airspace.

16. Draft guideline 1 (Use of terms) provided a legal definition of the atmosphere for the purposes of the guidelines, taking account of both its physical characteristics and its functional aspect.

17. Draft guideline 2 (Scope of the guidelines) defined the scope of the draft guidelines, limiting it to atmospheric degradation caused by human activities—whose effects on the atmosphere were often indirect, as had been demonstrated by the nuclear accidents at Chernobyl and Fukushima—and specifying that it covered both the natural and human environment, as well as the two causes of atmospheric degradation, namely the introduction into the atmosphere of deleterious substances and the alteration of the atmosphere. The question of specific substances that could cause atmospheric degradation would not be addressed; however, the interlinkages between the topic at hand and other relevant fields of international law, such as the law of the sea, commercial law and human rights law, would be taken into account.

18. Draft guideline 3 (Legal status of the atmosphere) contained a "without prejudice" clause to expressly protect the sovereignty of States over their airspace, as provided for under applicable international law, which was justified on the basis of the different nature of airspace and the atmosphere. He considered that the atmosphere was an essential natural resource, as set forth in draft guideline 3, but that it could be depleted, even if it was not exploitable in the ordinary sense of the word, and that it should thus be preserved. He suggested that the concept of "shared natural resources" could be applied to the problem of bilateral or regional transboundary pollution, and that of "common natural resources" to global environment issues relating to the atmosphere. However, for the legal characterization of the atmosphere and its protection, he would not apply the concepts of "common property" or *res communis*, which was too spatial, or "common heritage of humankind", which implied the collective management of problems related to the atmosphere and would thus be premature. Instead, the more moderate but more comprehensive concept of

[113] *Yearbook … 2013*, vol. II (Part Two), p. 78, para. 168.

[114] See "Protection of the atmosphere: statement of the Meeting of Legal and Policy Experts, Ottawa, Ontario, Canada, February 22, 1989", *American University Journal of International Law and Policy*, vol. 5, No. 2 (Winter 1990), pp. 529–542.

"common concern of humankind" seemed more likely to promote mechanisms for cooperation among States to solve a problem of common concern, on the basis of the draft guidelines.

The meeting rose at 11.45 a.m.

3210th MEETING

Friday, 23 May 2014, at 10 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Protection of the atmosphere (*continued*) (A/CN.4/666, Part II, sect. I, A/CN.4/667)

[Agenda item 11]

First report of the Special Rapporteur (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the first report of the Special Rapporteur on the protection of the atmosphere (A/CN.4/667).

2. Mr. KITTICHAISAREE said that the first report by the Special Rapporteur was a strong step forward as the Commission began its work on a pressing contemporary issue.

3. To supplement the detailed overview of relevant case law provided in paragraphs 42 to 50 of the report, the Special Rapporteur might also consider looking at the award rendered in 2013, by the Permanent Court of Arbitration, in the *Indus Waters Kishenganga Arbitration (Pakistan* v. *India)*, which had concerned a dispute over the construction of a hydroelectric project by India on a river shared by India and Pakistan. The case was significant because the Court had recognized that the *Trail Smelter* arbitration had enunciated a foundational principle of customary international environmental law: that of *sic utere tuo ut alienum non laedas* (use your own property so as not to injure that of another). That finding supported the Special Rapporteur's conclusion in paragraph 51 of his report that the *sic utere* principle was generally recognized as customary international law concerning transboundary air pollution between adjacent States. The Permanent Court of Arbitration had also strongly affirmed the status of the principle of sustainable development as part of contemporary customary international law.

4. With regard to draft guideline 1 and the proposed definition of the term "atmosphere", he agreed with the Special Rapporteur on the need for a legal definition that corresponded reasonably well to the scientific definition. For the purposes of the guidelines, the Special Rapporteur had excluded the upper atmosphere, of which the mesosphere and the thermosphere formed part, from the definition of "atmosphere". He wished to caution against that exclusion for three reasons.

5. First, changes in the mesosphere might serve as the first indicators of greenhouse effects. An increase in the concentration of greenhouse gases was generally understood to result in the warming of the troposphere; however, it could also produce a cooling of the stratosphere and the mesosphere, as had been observed in recent studies on climate change, including the Antarctic Program implemented by the Government of Australia.[115]

6. Second, although figure I of the first report showed that there were low orbital satellites in the upper atmosphere, the environmental consequences of the launch and presence of low orbital satellites was beyond the present scope of the guidelines.

7. Third, the limited attention currently being paid to the upper atmosphere for the purpose of the protection of the atmosphere was likely due to a lack of scientific knowledge, as had initially been the case with the ozone layer.

8. With regard to draft guideline 2, he noted that the draft guidelines were limited in scope to those adverse effects on the environment that were "significant" enough to warrant international regulation, yet no definition of the term "significant" appeared in the first report. Since, according to the report, the atmosphere was "a fluid, single and non-partitionable unit" (para. 81), it was worth considering whether the effect of the introduction of substances and energy into the atmosphere or the alteration of its composition would be considered "significant" if it had potentially widespread or long-term consequences. Given that the cumulative effect was the most ruinous one, even minor damage might, by accumulating, lead to significant damage for which no particular State was responsible, thereby undermining the "common concern" approach to the protection of the atmosphere.

9. With regard to draft guideline 3 (*a*), he said that, in reaching the conclusion that the protection of the atmosphere was a "common concern of humankind", the Special Rapporteur had helpfully analysed various concepts that could be applied to the legal status of the atmosphere. Two aspects of his analysis raised difficult questions that merited further discussion.

10. First, he fully agreed with the Special Rapporteur that the notion of "airspace" differed significantly from that of the "atmosphere": the former was an area-based concept, whereas the latter was a functional concept. The existing regime for the protection of the marine

[115] See the information on climate change in the mesosphere on the website of the Antarctic Program of the Government of Australia: www.antarctica.gov.au/about-antarctica/environment/atmosphere/studying-the-atmosphere/hydroxyl-airglow-temperature-observations/climate-change-in-the-mesosphere.

environment was based on the allocation of jurisdiction over various maritime zones to States. It would be neither appropriate nor practical to try to import such a framework into the protection of the atmosphere by allocating the atmosphere to the jurisdiction of States. However, he wondered whether treating the protection of the atmosphere as the "common concern of humankind" would mean skirting the questions of territory or jurisdiction. Would that diminish the relevance of the *sic utere* principle, which was the main principle governing cases of transboundary air pollution? If not, then how could the concept of the "common concern of humankind" be reconciled with the *sic utere* principle?

11. Second, in paragraphs 86 to 90 of his first report, the Special Rapporteur explained his preference for the concept of "common concern of humankind" over the broader concepts of "common property" and "common heritage". While he agreed with the Special Rapporteur that placing the atmosphere under common ownership and management would be going one step too far, it might be helpful to emphasize that it was not the atmosphere but rather the protection of the atmosphere that was a common concern. The Special Rapporteur seemed to have overstated the existing position of international law with respect to the concept of "common concern" when he asserted, in paragraph 89, that "[i]t will certainly lead to the creation of substantive legal obligations on the part of all States to protect the global atmosphere as enforceable *erga omnes*". The issue of "common concern" and *erga omnes* obligations was, at best, unsettled in international law. The 1970 case concerning the *Barcelona Traction, Light and Power Company, Limited,* cited for support by the Special Rapporteur, only mentioned the concept of *erga omnes* obligations in *obiter dicta* and, in any event, was unrelated to environmental protection. The real question was whether substantive obligations to protect the atmosphere, which were potentially far-reaching, existed in hard law. If, as the Special Rapporteur had observed, it was too early to give all States a legal standing to enforce rules relating to a common concern, did that mean that those so-called *erga omnes* obligations were essentially unenforceable? Or were there certain fundamental duties in the protection of the atmosphere that could be enforced against a State?

12. The concept of "common concern" implied a need for international cooperation in the protection of the atmosphere. The duty to cooperate on matters of common concern had proved to be enforceable in the context of the protection of the marine environment. The provisional measures ordered by the International Tribunal for the Law of the Sea in the 2001 *MOX Plant Case* and the 2003 case concerning *Land Reclamation by Singapore in and around the Straits of Johor* made that clear. The Special Rapporteur might therefore wish to explore whether the duty to cooperate formed part of the concept of "common concern" or *erga omnes* obligations in the context of the protection of the atmosphere.

13. Determining the legal status of the atmosphere and the best approach for its protection posed formidable difficulties, and the Special Rapporteur's first report was an important and thoughtful contribution to that effort. He highly recommended referring the draft guidelines to the Drafting Committee.

14. Mr. PARK said that, in his first report, the Special Rapporteur clearly explained the historical evolution of the subject and contained references to useful source material.

15. Generally speaking, the tentative workplan contained in paragraph 92 of the first report did not offer sufficient information about the direction in which to go with the topic. It would be better to supply a road map comprising, for example, an introduction identifying the main problems; the basic principles that might apply to the protection of the atmosphere; the implementation of those basic principles; general provisions and other matters; and questions that should be discussed as a matter of priority.

16. Although the Special Rapporteur tried to circumscribe the scope of the topic according to the four-point "understanding" referred to in paragraph 5 of the first report, certain conflicts were likely to arise. Paragraph 68 of the report identified three core international issues concerning the atmosphere—air pollution, ozone depletion and climate change—but according to the "understanding", the work on the topic must not interfere with political negotiations on precisely those subjects.

17. Regarding the methodology, the Special Rapporteur's top priority seemed to be the protection of the atmosphere itself, but he personally thought the focus should be on regulating the activities of States or individuals that had a direct or indirect impact on the atmosphere. The purpose of the law of the air, like that of the law of the sea or outer space, should be protection through regulation of States' activities, and the rights and obligations of States should be clarified as a first step.

18. The Special Rapporteur's theoretical approach was reminiscent of the academic debate surrounding the legal status of air at the beginning of the twentieth century, when some international lawyers had insisted that the very nature of air, which flowed freely across national boundaries, made the exercise of power over it unacceptable and impossible. Not long afterwards, however, the principle of airspace sovereignty had become established, and the notions of "sovereign airspace" and "airspace over the high seas" had been applied to all activities in the air. The formula was analogous to that of the law of the sea, under which the sea was divided into several zones according to the degree of sovereignty or jurisdiction exercised over them by the coastal State. The protection of the atmosphere should therefore be approached by differentiating between the atmosphere which was subject to a State's sovereignty or control, and that which was not. That distinction would necessitate amendments to draft guidelines 1 (Use of terms) and 3 (Legal status of the atmosphere).

19. Turning to draft guideline 1, he said that, while it was necessary to adopt a working legal definition corresponding to the scientific definition of the atmosphere, he had doubts about arbitrarily confining it to the troposphere and the stratosphere, even though those were the layers where air pollution, ozone depletion and climate change preponderantly occurred. Restricting the definition of the atmosphere to the two bottom layers would considerably lower the altitude at which States could exercise sovereignty or control over the air situated above or flowing over its territory and maritime zones.

20. He also had doubts about the expression "layer of gases", which would entail a discussion of what was meant by "layer" and "gases", and he preferred the term "gaseous envelope". The three core international issues of air pollution, ozone depletion and climate change should also be defined in the draft guidelines, although care must be taken not to encroach upon the relevant political negotiations.

21. Concerning draft guideline 2, on the scope of the guidelines, he said the nature of air pollution merited further discussion. It should be clarified, in terms of law, that the place of origin or causation of pollution was different from the place where its effects were felt. Movement in the atmosphere quickly transported pollutants all over the globe, far from their original sources, and their accumulation had deleterious effects on the atmosphere. However, it was often impossible to identify clearly the causes and original sources of atmospheric degradation. The protection of the atmosphere should therefore be formulated in terms of restriction of hazardous substances, as was done in the existing relevant conventions.

22. He had difficulty with the statement in paragraph 76 of the first report that the subject matter of the draft guidelines would include the introduction of energy into the atmosphere. That raised the issue of radioactive pollution and limits on radioactive emissions, something already covered by national laws, international documents and eight protocols to the 1979 Convention on long-range transboundary air pollution, which was cited in the last footnote to paragraph 76 of the first report.

23. Draft guideline 3 (Legal status of the atmosphere) was difficult to accept. In his view, the legal status of the atmosphere situated even temporarily over a State's territory or territorial sea was quite different to that of the atmosphere over the high seas, or over the Antarctic zone. The latter could, perhaps, be deemed a "common concern of humankind", but that was not true of the atmosphere over a State's territory, which was under the control of that State. To follow the legal regime of the law of the sea, for the purposes of its legal status, the atmosphere should be divided into the atmosphere in a State's airspace and the atmosphere outside that airspace. Moreover, it was unclear how international legal standards could be established with respect to a "common concern of humankind"; it would certainly amount to progressive development of international law.

24. While there was undoubtedly a need for a legal framework covering the entire range of environmental problems connected with the atmosphere in a systematic manner, protection of the atmosphere clearly raised many difficult technical and political issues.

Organization of the work of the session (*continued*)[*]

[Agenda item 1]

25. Mr. SABOIA (Chairperson of the Drafting Committee) said that the Drafting Committee on subsequent agreements and subsequent practice in relation to the interpretation of treaties was composed of Mr. Hmoud, Mr. Kamto, Mr. Kittichaisaree, Mr. Murphy, Mr. Park, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood, Mr. Nolte (Special Rapporteur) and Mr. Tladi *ex officio*.

The meeting rose at 10.45 a.m.

[*] Resumed from the 3200th meeting.

3211th MEETING

Tuesday, 27 May 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Protection of the atmosphere (*continued*) (A/CN.4/666, Part II, sect. I, A/CN.4/667)

[Agenda item 11]

First report of the Special Rapporteur (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the first report of the Special Rapporteur on the protection of the atmosphere (A/CN.4/667).

2. Mr. MURPHY said that the inclusion of the topic in the Commission's programme of work, far from having received strong, general support in the Sixth Committee, had met with mixed reactions. Certain States were resolutely opposed to its inclusion and many had stressed the importance of adhering to the conditions for considering the topic specified in the Commission's 2013 understanding. However, the first report of the Special Rapporteur seemed to depart from the letter and the spirit of that understanding, the crux of which was, not that the Commission should avoid interfering only in "*ongoing* treaty negotiations", but rather, that the analysis of certain questions was clearly precluded. Moreover, even though there was no express mention made of customary international law, the conditions set out in the understanding applied not only to treaty regimes but to all sources of international law.

3. Even though the project was *not* intended to "fill" the gaps in treaty regimes, in paragraphs 12, 13 and 15 of his first report, the Special Rapporteur tended to indicate that its goal was in fact to find and fill gaps in treaty regimes by identifying principles and rules of law.

Similarly, while the draft guidelines should not "seek to impose on current treaty regimes legal rules or legal principles not already contained therein",[116] in paragraph 13 of his first report the Special Rapporteur envisaged providing "appropriate guidelines for harmonization and coordination among treaty regimes", which would be tantamount to imposing the rules and principles of one regime onto another. The precautionary principle and other questions relating to liability in particular, which were not to have been included in the project, were nevertheless addressed. Paragraph 39 of the report stated that the London adjustments[117] to the Montreal Protocol on Substances that Deplete the Ozone Layer had served to strengthen the principle of common but differentiated responsibilities, whereas the drafters of the instrument had scrupulously avoided any express mention of that principle. Similarly, in paragraph 40, the description of the commitments arising from the United Nations Framework Convention on Climate Change wrongly suggested that only developed countries had undertaken to reduce their greenhouse gas emissions, and that could lead the Commission to be perceived as taking sides on issues that were currently under negotiation.

4. As to the methodology followed in the first report, the draft guidelines and some parts of the report had no basis in treaty law, State practice or case law but instead relied on the views of NGOs or on doctrine, despite the fact that the Commission had traditionally been highly attuned to whether *States* had accepted a rule as law. For example, the recommendations made at the workshop held in Gothenburg (Sweden) in June 2013,[118] of which the States parties to the Convention on long-range transboundary air pollution had merely taken note,[119] could not in themselves justify the statement that the expectations of the international community towards the Commission with regard to the topic were particularly high, especially when 50 States and the European Union had challenged the notion. Similarly, it was important to carefully analyse the non-binding instruments that the first report cited as important sources for determining *opinio juris*, because if most of those instruments had been drafted in a non-binding form, it was because States did not believe them to reflect legal requirements and because those instruments, created to address particular issues, did not lay down general rules of international law.

5. As Mr. Kittichaisaree had pointed out, the definition of the atmosphere proposed in draft guideline 1 seemed to be incomplete, as it inexplicably excluded a number of atmospheric layers. Furthermore, the presence of "airborne substances" was not relevant to defining the atmosphere, as they were also present in outer space. The atmosphere was defined by the simple statement that it went no higher than the upper limit of the stratosphere, beyond which outer space began. However, outer space and its delimitation were expressly excluded from the project by the 2013 understanding. Moreover, it was impossible to disassociate the concepts of atmosphere and airspace, as the latter was by definition a space where there was "air", and if there was no "atmosphere", there was no "air", with the result that the proposed definition could be interpreted as implying that a State's airspace stopped 50 kilometres above the Earth's surface. In addition, the fact that treaties relating to atmospheric issues did not define the term begged the question of whether there was actually any need to define it; after all, the conventions on the law of the sea did not define the term "sea". Lastly, such a definition could have adverse effects if it was fed back into existing treaty regimes; its link with the concept of the planetary boundary layer contained in the Vienna Convention for the Protection of the Ozone Layer was far from clear.

6. At first sight, the scope of the guidelines, as proposed in draft guideline 2, seemed strikingly broad, as it referred to all human activities that altered the composition of the atmosphere, which included the simple act of breathing. However, as Mr. Park had noted, the relevant activities had to have a transboundary effect before they fell within the purview of international law. The scope of the project was subsequently restricted to activities affecting the Earth's *entire* atmospheric environment, which would imply that the guidelines addressed only "global atmospheric problems", namely ozone depletion and climate change. Moreover, draft guideline 2 (*b*) contravened the 2013 understanding, which favoured the development of guidelines in order to avoid identifying new legal principles. Lastly, a provision devoted to scope was not essential. However, if it was retained, it should reflect the preliminary scope of the project established in the 2013 understanding.

7. Draft guideline 3 contained elements which, at first glance, seemed to have little to do with the legal status of the atmosphere, aside from the controversial term "common concern of humankind". While the term appeared in the preamble to the United Nations Framework Convention on Climate Change, which addressed a single phenomenon, it did not refer to the "atmosphere" as such there, but rather to the concern caused by the adverse effects of a change in the Earth's climate. However, as Mr. Park had pointed out, the protection of a natural resource had never been considered to be a "common concern of humankind". The term did not appear in any of the treaties on the atmosphere or in any of the regimes developed since. In the report, the use of the term "common concern" in the context of the atmosphere as a whole was supported by a single academic work which actually suggested three interpretations of that phrase and emphasized the novelty of the concept in international law. Other academic works, upon which the Special Rapporteur also appeared to have drawn, injected conflicting content and effects into the use of the term. Those ranged from a legal responsibility to prevent damage to a natural resource (would States then have to prevent all types of emissions to protect the atmosphere?) to the rights and duties of States, and even of individuals, to guarantee the protection of the atmosphere though joint or separate action, including though legal channels, and even to a general obligation of international environmental solidarity between industrialized and developing States.

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[116] *Yearbook … 2013*, vol. II (Part Two), p. 78, para. 168 (*d*).

[117] United Nations, *Treaty Series*, vol. 1598, No. 26369, p. 469.

[118] P. Grennfelt, *et al.* (ed.), *Saltjöbaden V–Taking International Air Pollution Policies into the Future, Gothenburg, 24–26 June 2013*, Copenhagen, Nordic Council of Ministers, 2013, pp. 11 *et seq.*, available from: www.norden.org/en/publication/saltsjobaden-v-taking-international-air-pollution-policies-future.

[119] See ECE/EB.AIR/122, para. 18.

8. Although the Special Rapporteur noted in paragraph 89 of his first report that the concept of common concern could lead to the creation of obligations *erga omnes,* the *Trail Smelter* case showed that the pollution of the atmosphere did not necessarily violate obligations *erga omnes*, especially when it remained localized. Furthermore, as the Study Group on fragmentation of international law had pointed out, while certain obligations in international law were *erga omnes,* the bulk of international law emerged from bilateral relations between States.[120] It should also be noted that the obligations *erga omnes* referred to in the *obiter dictum* of the *Barcelona Traction* case concerned fundamental rights, aggression and genocide, to which the obligation not to pollute the atmosphere was in no way comparable. In his first report, the Special Rapporteur did not specify the consequences, under the articles on the responsibility of States for internationally wrongful acts, that could arise from that obligation if it were considered to be *erga omnes*. It would therefore be unwise for the Commission to adopt the term "common concern" which, as Mr. Kittichaisaree had said, was not settled in international law and could prove dangerous if the underlying notion was that of an *actio popularis* should the deadlines and targets set for work on climate change not be met.

9. At that stage, he was not in favour of referring draft guideline 3 to the Drafting Committee. He believed that the Commission should take a different approach to the draft guidelines, grounded in State practice, and gear the project towards policymakers grappling with problems relating to the atmosphere. One draft guideline could recall that existing State practice demonstrated that States were cooperating on those problems and that such cooperation should continue. Another draft guideline could state that a wide range of bilateral, regional and universal treaties and other instruments, which could be listed in the commentary, bore testament to that cooperation and helped to coordinate State activities. A third draft guideline could point to the different models for treaty regimes, including the model of a framework convention supplemented by protocols, and the commentary to that guideline could include an analysis of the techniques used. Those different types of "practice pointers" would allow States to understand the techniques used to design existing regimes so that they could apply them to new regimes. *A contrario,* a one-size-fits-all approach to the topic, which wrongly presupposed that all problems related to the atmosphere were of a similar nature and aimed to develop uniform legal rules to harmonize disparate regimes, was bound to be problematic. He suggested that a working group be convened at a later stage to assist the Special Rapporteur in developing those guidelines, and he agreed that a road map or a general plan could serve to guide the Commission's work on the topic.

10. Mr. NIEHAUS said that the Special Rapporteur had clearly demonstrated the importance of the protection of the atmosphere as a common concern of humankind, a problem that the Commission must address for the sake of future generations. The first report, attesting as it did to the Special Rapporteur's intention to broach the topic from a purely legal perspective, seemed likely to allay the fears expressed by certain States in the Sixth Committee.

11. Like the Special Rapporteur, he thought it would be useful to discuss the issues of transboundary air pollution, depletion of the ozone layer and climate change, insofar as they were not the subject of ongoing political negotiations. Moreover, in his first report, the Special Rapporteur rightly recalled that the aim was not so much to point to guilty parties or those responsible, but to identify possible mechanisms for international cooperation in dealing with common problems.

12. With regard to draft guideline 1, he said that he endorsed the definition proposed by the Special Rapporteur, who had decided to limit it to the lower layers of the atmosphere, namely the troposphere and the stratosphere. Certain members were of the opinion that the mesosphere and the thermosphere should also be included but, aside from the fact that air was non-existent in those upper layers, they were part of outer space, which was excluded from the topic. In the case mentioned by Mr. Kittichaisaree, where the mesosphere might be affected by climate change, it would inevitably be of natural origin and not caused by human activities. It seemed impossible to speak of jurisdiction or sovereignty over the atmosphere, as it was a moving substance, differing in that respect from airspace, which was a spatial delimitation.

13. Draft guideline 2 indicated that only damage caused by human activities fell within the scope of the draft guidelines. Subparagraph (*b*) referred to the fact that the basic principles relating to the protection of the atmosphere were interrelated. If by that was meant the links between the law of the atmosphere and the other fields of international law mentioned in paragraph 77 of the first report, the provision should be formulated more clearly. Draft guideline 3 set out the legal status of the atmosphere, which the Special Rapporteur had chosen to delineate with reference to the concept of the "common concern of humankind" as used in the 1992 United Nations Framework Convention on Climate Change. As the Special Rapporteur rightly recalled, the rules relating to the legal status of airspace remained applicable.

14. Lastly, he said that he was in favour of sending the three draft guidelines to the Drafting Committee. He drew members' attention to two recent studies conducted by the Organisation for Economic Co-operation and Development and WHO, which reaffirmed the importance of the topic under consideration by demonstrating the human and material costs of air pollution.

15. Mr. TLADI said that, after having read the first report, he wondered whether there was any treaty practice to be examined outside the limits established for the consideration of the topic in 2013. The main instruments analysed in the report concerned the very areas that were not supposed to be dealt with by the Commission, such as long-range transboundary air pollution, the ozone layer and climate change. Matters such as the precautionary principle and common but differentiated responsibilities, which were ubiquitous in environmental treaty law, were

[120] See the report of the Study Group of the Commission on fragmentation of international law, document A/CN.4/L.682 [and Corr.1] and Add.1, mimeographed; available from the Commission's website, documents of the fifty-eighth session (2006). The final text will appear as an addendum to *Yearbook … 2006*, vol. II (Part One).

also excluded from the topic. Moreover, as mentioned by Mr. Park, the simple fact of defining a concept so intrinsic to the protection of the environment as the depletion of the ozone layer would be a breach of the preconditions placed on the Commission's work, hence the clear need to adopt a more flexible approach to those preconditions.

16. One of the aims outlined by the Special Rapporteur in paragraph 13 of the first report was that of exploring the introduction of cooperation mechanisms to solve problems of common concern—a welcome objective, provided that the existing legal obligations were likewise discussed. As to the identification of sources of law, in paragraph 15, the Special Rapporteur said that it was necessary to distinguish arguments based on existing law from the "preferences" of *lex ferenda*, which, in the field of international environmental law, were sometimes "smuggled" into the interpretation of *lex lata*. While that exclusively legalistic approach might seem the correct one, it subjected interpretation, an essential element in identifying the law, to undue criticism. As the Special Rapporteur himself had said, the first step was to clarify the meaning and function of existing legal principles, something which involved a certain degree of interpretation, and even to envisage "reinterpreting" them if necessary. In paragraph 46, he cited the *Gabčikovo-Nagymaros Project* case to illustrate the irrelevance of arguments based on "preferences" or priorities and not on positive law. In fact, however, it was on the basis of the applicable law that the International Court of Justice had rejected the arguments made by Hungary. On the other hand, in paragraph 88 of his first report, the Special Rapporteur said that the application of the concept of common concern to all atmospheric problems seemed appropriate, something that he himself did not contest, even though the argument was based on preferences and priorities and had no firm legal basis. The Special Rapporteur provided a very useful summary of international jurisprudence on international environmental law. The *Pulp Mills on the River Uruguay* case was particularly noteworthy in that the International Court of Justice had recognized for the first time that there was a general obligation, independent of the treaty, to perform environmental impact assessments. However, it had not addressed all aspects of the requirement, and that afforded the Commission the possibility of clarifying the obligation without overstepping the limits imposed for the consideration of the topic. The analysis of the principal non-binding instruments was also useful and, in that respect, he did not agree with the limited approach advocated by Mr. Murphy. For example, the precautionary principle was relevant as a legal principle because it was present not only in treaties but also in a large number of non-binding instruments and in bilateral agreements. In that connection, equity principles, such as Principles 9 and 11 of the Declaration of the United Nations Conference on the Human Environment[121] (the Stockholm Declaration), warranted greater attention.

17. Turning to draft guideline 1, he said that he was not convinced that it was appropriate to provide a definition of the atmosphere, at least at that early stage of the Commission's work. As to the scope of the guidelines, which was defined in draft guideline 2, the Commission should clearly state that the exclusion of certain principles and concepts, in keeping with the preconditions governing its consideration of the topic, was without prejudice to the standing of those principles and concepts in international law. With regard to draft guideline 3, the Special Rapporteur should explain why he had chosen to make the protection of the atmosphere a "common concern of humankind", and not to use the idea of a "common heritage of humankind". The fact that the latter concept entailed the exploitation of resources, which would require a "far-reaching institutional apparatus" similar to the International Seabed Authority, was insufficient reason, especially as the emphasis would be on preserving the atmosphere and not exploiting it.

18. Lastly, as Mr. Park had pointed out, the United Nations Convention on the Law of the Sea could provide a useful analogy, in particular with regard to the obligation to assess environmental risks, which that instrument addressed, and concerning the question of territorial sovereignty. Although the atmosphere flowed freely through national boundaries, the same could be said of oceans, the delimitation of which had merely served to complicate their governance.

19. Mr. HASSOUNA said that, in his approach, the Special Rapporteur had scrupulously adhered to the restrictions imposed by the Commission for considering the topic in question, which had made his task all the more difficult, as the protection of the atmosphere was closely linked to climate change and to other areas that had been excluded. In the absence of legal norms on the subject, the Special Rapporteur had suggested "reinterpreting" existing legal concepts, principles and rules. In doing so, however, he should bear in mind that the Commission had undertaken to not "fill the gaps" in existing treaty regimes.

20. The definition of the atmosphere proposed in draft guideline 1 was too specific and precluded the possibility that scientific knowledge might evolve. The definition should focus on the functional aspect of the atmosphere, namely its role in the transport and dispersion of airborne substances, rather than on its physical aspects or its delimitation. In draft guideline 2, several terms might unnecessarily restrict the scope of the Commission's work. The human activities addressed were those that introduced deleterious substances or energy into the atmosphere or altered the composition of the atmosphere and that had significant adverse effects on human life and health and the Earth's natural environment. However, those two cumulative conditions set a very high threshold, which would exclude, for example, the activities intended to alter atmospheric conditions mentioned in paragraph 74 of the first report, since they were intended to produce desirable changes. The term "deleterious" was also problematic, as the same substance could be deleterious or innocuous depending on its location in the atmosphere. Similarly, the adjective "significant" was open to numerous interpretations and, in any case, given the importance of the atmosphere, was too restrictive to characterize only those adverse effects on the environment that could be covered by international regulations.

[121] *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. I, p. 3.

It would be more appropriate to define the scope of the draft guidelines in broader terms so as to encompass all human activities affecting the atmosphere. The concept of protection should also be defined in the draft guidelines. In draft guideline 2 (*b*), the adjective "basic", used to describe the principles relating to the protection of the atmosphere, should either be clarified or omitted. The last part of the sentence was also unclear, especially as the Special Rapporteur explained in his first report that the law of the atmosphere was intrinsically linked to other fields of international law.

21. The saving clause in draft guideline 3 (*b*) was justified in light of the differences between the notions of airspace and atmosphere, which were explained in detail in the first report. However, subparagraph (*a*) did not provide a satisfactory definition of the legal status of the atmosphere. For example, did the fact that the protection of the atmosphere was "a common concern of humankind" give rise to legal obligations or did it merely serve to justify international law-making because the issue no longer belonged to the domain reserved for national law? The Special Rapporteur assumed that the concept of common concern would lead to the creation of *erga omnes* obligations to protect the atmosphere, yet he had stated that it was too early to interpret the concept as giving States an interest or standing to act in that regard. A more in-depth analysis of whether such rights and obligations existed in international law was necessary, not only to justify the inclusion of that provision but also to clarify its meaning and to improve the understanding thereof. To that end, draft guideline 3 should be referred to the Drafting Committee, along with draft guidelines 1 and 2.

22. Lastly, he said that, while the protection of the atmosphere was undoubtedly a challenging topic, the Commission should treat it as *sui generis* and not adhere too closely to existing regimes or the way in which other natural resources were treated, thereby leaving the door open for future scientific developments.

23. Mr. PETRIČ said that he had supported the inclusion in the Commission's programme of work of the topic of the protection of the atmosphere because it was a matter of urgency and such protection was far from being guaranteed in general international law. Before turning to the draft guidelines themselves, he wished to make two preliminary remarks. First, it should always be borne in mind that the Commission had included the topic in its programme of work on the condition that the outcome of its work would take the form of non-binding draft guidelines,[122] a goal which States in the Sixth Committee had generally approved. Second, the Special Rapporteur had been fairly audacious in stating that the concept of "common concern of humankind", while well-established in international environmental law, was also applicable to the protection of the atmosphere. In fact, there was no practice to suggest that States were willing to accept that concept, especially as it was used in instruments on climate or biodiversity that had nothing to do with the legal status of the atmosphere. Taking into account the lack of State practice and the close relationship between the concepts of airspace and atmosphere, which were virtually indistinguishable, the conclusions drawn by the Special Rapporteur in paragraphs 88 and 89 of the first report were not acceptable.

24. Instead of defining the legal status of the atmosphere by applying the concept of common concern of humankind, which was important but imprecise and could prove controversial, the Commission should focus on preventing the pollution of the atmosphere by applying the regulations that already existed in customary international law, in the Charter of the United Nations and in other texts. The principle of cooperation was firmly established in international law, as the Commission had recently confirmed in its work on the protection of persons in the event of disasters. One could find examples in practice to show that States, which were already bound to cooperate to prevent climate change and to preserve biodiversity, were also bound to cooperate to protect the atmosphere, whatever its legal status. In addition to that obligation, when establishing the legal basis for the protection of the atmosphere, the Commission should also take into account the rules of good-neighbourliness, which formed a general principle of law and, as such, were a formal source of international law.

25. Concerning draft guideline 1, he agreed with the Special Rapporteur's proposal to establish contacts with representatives of interested intergovernmental organizations. He also agreed on the need to define the atmosphere and the term "air pollution", but only for the purposes of the guidelines. As to draft guideline 2, which warranted further examination, he pointed to a contradiction between paragraph 80 of the first report, which stated that the notion of "airspace" differed significantly from that of the "atmosphere", and paragraph 73, which stated that the atmosphere had been used in several ways, most notably in the form of "aerial navigation". That contradiction clearly illustrated the close relationship between airspace and the atmosphere in terms of their legal status. In any event, there was nothing in the draft guideline, including in subparagraph (*b*), to suggest that the definition of the legal status of the atmosphere fell within the scope of the Commission's project.

26. Draft guideline 3 was acceptable, with the exception of its title, which characterized the protection of the atmosphere, and not the atmosphere itself, as a common concern of humankind. Lastly, he said that he was awaiting clarification from the Special Rapporteur before taking a position on whether the draft guidelines should be referred to the Drafting Committee.

27. Mr. FORTEAU noted with satisfaction that the Special Rapporteur had taken very seriously the doubts expressed by certain members and certain States over whether it was advisable to consider the topic, thus demonstrating his willingness to address the concerns of all parties. As a preliminary remark, he noted that the technical nature of the matters at hand called for the creation of a glossary. More should have been done at the outset to map out the Commission's future course and to show exactly how the Commission could make a useful contribution. It was all the more necessary to clearly define that future course and to devise a workplan given that the Commission had included the topic in its programme of

[122] *Yearbook … 2013*, vol. II (Part Two), p. 78, para. 168 (*d*).

work subject to certain conditions. According to paragraphs 13 and 15 and the last footnote to paragraph 17 of the first report, new rules were to be created and gaps filled by the proposed draft guidelines—yet that ran counter to both the Commission's mandate and the decisions it had taken at its previous session.

28. Concerning draft guideline 1 (the term "draft guideline" should be translated into French as *ligne directrice*), he said that he did not possess the scientific knowledge necessary to adopt a position on the best way to define the atmosphere. It seemed to him, however, that in order to determine whether the atmosphere should be limited to the troposphere and the stratosphere, one must be sure that no environmental degradation took place or was likely to take place in the other layers. In addition to those scientific difficulties, the draft guideline also posed legal problems. If, as indicated in paragraph 69 of the first report, most international treaties and documents did not define the "atmosphere", then two possibilities emerged: either there were some treaties that defined the atmosphere and they should be taken into account, or it had never been deemed necessary to define the atmosphere—which seemed to be the case—and so the Commission should also refrain from doing so.

29. As to draft guideline 2, before deciding on its wording, the Commission should agree on the exact scope of the project. There were three levels of air pollution: pollution emitted in the territory of a State and which did not cross its borders; transboundary pollution affecting only one State; and lastly, global pollution. Paragraph 76 stated that the Commission's work would address both the transboundary and global aspects of atmospheric degradation, which seemed reasonable. However, the broader scope of the draft guideline also seemed to cover purely domestic pollution and, for that reason, needed clarification. The Special Rapporteur had provided no justification for the use of the adjective "significant", which made it impossible to decide on its merits.

30. As to draft guideline 3, the idea that the protection of the atmosphere was a common concern of humankind had no basis in current practice. The precedents cited to support that statement were not opposite. To say that the evolution of the climate and climate change and its harmful effects were a common concern of humankind was one thing, but to say that the *protection* of the atmosphere was such a concern was quite another. In other words, to say that a fire which ravaged a neighbour's house was a common concern of the inhabitants of a village was not the same as saying that protecting that house against fire was a concern of all those inhabitants.

31. The Special Rapporteur had rightly indicated in paragraph 89 of his first report that the concept would certainly lead to the creation of obligations *erga omnes* on the part of all States to protect the global atmosphere, but he had immediately softened that statement by saying that it was too early to interpret the concept of common concern as giving all States a legal interest, or standing, in the enforcement of rules concerning the protection of the global atmosphere. Several observations should be made in that regard: first, if it was premature to recognize obligations *erga omnes*, it was highly unlikely that the Commission would be able to adopt the proposed draft guideline; second, if the Commission retained the idea that the protection of the atmosphere was a common concern of humankind, it would almost certainly give rise to that type of obligation; third, instead of putting the cart before the horse, the Special Rapporteur should have first endeavoured to determine the precise nature of the obligations with which States had to comply, and then proposed a legal definition; and fourth, the concept of a common interest in protecting the atmosphere might well prove hard to apply. While it could be said that all States had a legal interest in another State's not committing torture or genocide, it was more difficult to contend that all States had a legal interest in another State's enforcing the obligation to protect the atmosphere when, in reality, all States contributed to its degradation, to differing degrees.

32. That very particular and global type of responsibility, which was also very new, raised eminently complex questions of causation that made it difficult to think in terms of obligations *erga omnes* or a common interest in protecting the atmosphere. Such obligations implied identifying a responsible party whom everyone could hold accountable. In reality, there was a very complex system of overlapping responsibilities in which the responsible parties were also the victims, albeit to differing degrees. Certain authors spoke of multiparty causation, while highlighting the legal difficulties created by damage to which all States contributed on different scales and to different degrees. The difficulty of reasoning in terms of liability in the present case had been referred to in the preamble to Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.[123]

33. In *EPA* v. *EME Homer City Generation*, the Supreme Court of the United States had ruled on the difficult question of allocation of liability when it was shared in differing degrees. It had found the questions of causation in that case to be extremely complex and that, for that reason, had felt the need to rely more heavily on administrative and political decisions than on legal mechanisms to find appropriate solutions. Caution was therefore of the essence, militating against the Commission's adoption from the outset of its work of a definition that elevated the protection of the atmosphere to a common concern of humankind. By doing so, it would be generating a new regime of liability whose consequences and legal implications would go well beyond the Commission's project. Draft guideline 3 raised the more general question of the place that questions of liability should occupy in the Commission's work on the protection of the atmosphere. It would be useful to know whether such questions fell within the scope of the topic or whether the Commission needed only to establish primary obligations—and if so, which ones.

The meeting rose at 1 p.m.

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[123] *Official Journal of the European Union*, No L 143 of 30 April 2004, p. 56.

3212th MEETING

Wednesday, 28 May 2014, at 10 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Protection of the atmosphere (*continued*) (A/CN.4/666, Part II, sect. I, A/CN.4/667)

[Agenda item 11]

First report of the Special Rapporteur (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the first report of the Special Rapporteur on the protection of the atmosphere (A/CN.4/667).

2. Mr. EL-MURTADI SULEIMAN GOUIDER said that although the inclusion of the topic in the long-term programme of work had been welcomed by many States, others had voiced concerns about its complex political and technical aspects. Nevertheless, the Special Rapporteur was to be commended for having fulfilled the basic objectives of a first report. It presented an in-depth and comprehensive study of the topic based on existing legislation, practice and principles and the understanding reached by the Commission at its sixty-fifth session, as set out in paragraph 5 of the first report. He hoped that the report would, as indicated in paragraph 8, "stimulate discussion within the Commission in order to provide the Special Rapporteur with the requisite guidance on the approach to be followed and the goal to be achieved". Against that background and in light of comments made during the debate in plenary thus far, he had two general observations to make.

3. First, concerning the desired outcome of work on the topic, he agreed that it should take the form of draft guidelines, on the understanding that the General Assembly and Member States would decide as to the final form. The scope of the draft guidelines should encompass the deterioration of the environment caused by human activities, the protection of the natural environment and the human environment as well as the causes of atmospheric degradation. That was in keeping with the Commission's previous practice, including its draft articles on the law of transboundary aquifers,[124] and with the provisions of relevant international treaties, such as the Convention on long-range transboundary air pollution and the United Nations Framework Convention on Climate Change.

4. Second, concerning the methodology to be followed, he expressed support for the framework described in paragraph 5 (*a*)–(*c*) of the report and the clarifications provided in the last footnote to that paragraph. The international community clearly attached great importance to the protection of the atmosphere. He therefore looked forward to further work on the topic, in line with the tentative plan of work outlined by the Special Rapporteur in paragraph 92 of the first report, work which should take into account comments and suggestions made during the debate in the Commission.

5. Mr. HMOUD recalled that the Commission had engaged in extensive debate on whether to tackle the issue of the legal protection of the atmosphere. That debate, which had culminated in the understanding set out in paragraph 5 of the first report, was crucial in ensuring that the Commission's work would contribute to a mechanism for effective protection of the atmosphere that took into account existing legal regimes on air pollution, ozone depletion and climate change, but was without prejudice to relevant political negotiations. However, the Commission should be careful not to adopt a minimalist text devoid of any legal significance: the limitations of the understanding should not deprive the entire project of its legal substance. The Special Rapporteur should accordingly be allowed to discuss the status of the relevant existing legal principles and instruments and to propose draft guidelines, on which the international community would of course have the final say. There were other limitations, arising from the technical nature of the topic, as was true of any specialized matter requiring expert scientific input. The Commission should be able to seek the necessary technical advice when required.

6. He agreed that the Commission's work should not duplicate, but instead complement, its previous work on the issue of transboundary harm, namely the 2001 draft articles on prevention of transboundary harm from hazardous activities[125] and the 2006 draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.[126] The draft guidelines should reaffirm, and not contradict, the rules and principles under existing regimes relating to air pollution, ozone depletion and climate change. It was therefore necessary to clearly determine the nature of the general obligations and establish a hierarchy based on the *lex specialis* character of existing regimes. The goal identified in paragraph 13 of the first report, providing appropriate guidelines for harmonization and coordination among treaty regimes within and

[124] See the draft articles on the law of transboundary aquifers adopted by the Commission at its sixtieth session and the commentaries thereto in *Yearbook … 2008*, vol. II (Part Two), pp. 19 *et seq*., paras. 53–54. See also General Assembly resolution 63/124 of 11 December 2008, annex.

[125] See the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 146 *et seq*., paras. 97–98. The articles on prevention of transboundary harm from hazardous activities are reproduced in the annex to General Assembly resolution 62/68 of 6 December 2007.

[126] See the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities adopted by the Commission at its fifty-eighth session and the commentaries thereto in *Yearbook … 2006*, vol. II (Part Two), pp. 58 *et seq*., paras. 66–67. See also General Assembly resolution 61/36 of 4 December 2006, annex.

outside environmental law, was crucial to maximizing the legal protection of the atmosphere and assisting States in overcoming the problems arising from the multiplicity of obligations under the various regimes.

7. The first report drew on a wide variety of sources to identify the legal principles and rules applicable to the protection of the atmosphere, which had then to be placed in the right context in terms of the aspect of protection to which they applied. The sources revealed areas where cooperation, review and enforcement might be needed. Another key issue arising from the sources was whether and to what extent sustainable development should be considered. Paragraph 56 of the first report cited the Rio Declaration on Environment and Development,[127] which purported to balance environmental protection with economic interests and development goals. However, he considered that such matters did not fall within the scope of the topic.

8. The case law of courts and tribunals on transboundary harm was relevant for assessing the responsibilities of States, including the obligation not to cause harm, the prevention aspect and liability for damage. However, transboundary harm was much more limited in scope than the legal protection of the atmosphere. While significant harm was a standard in transboundary liability, the question was what the threshold for atmospheric damage would be and how it would be assessed, assuming that there was an emerging norm regarding the obligation not to cause atmospheric harm.

9. A key issue relevant to the Commission's project was the legal nature of the right to be free from nuclear atmospheric tests and the legal interests involved. The International Court of Justice had not shed much light on the relevant principles, except in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, where it mentioned "the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States" (para. 29 of the opinion).

10. Concerning draft guideline 1, he noted that the Special Rapporteur's approach to the definition of the atmosphere was to confine the spatial scope to the troposphere and the stratosphere, "within which the transport and dispersion of airborne substances occurrs". However, the rationale for that definition was not explained. Although the core problems relating to atmospheric degradation did occur in the lower atmosphere, it must be ascertained that atmospheric problems did not have an effect on the upper layer or that human activities in the upper layer could not cause overall degradation before the upper layer was excluded from the definition. In addition, the scope of the definition should not be tied to the activity involved, namely the transport and dispersion of airborne substances, for that would confine the legal regime on protection to those specific substances. That did not seem to be the intention, as draft guideline 2 extended the scope to human activities that altered the composition of the atmosphere.

11. He agreed with the Special Rapporteur that the scope of the draft guidelines encompassed three main elements: human activities, the protection of the natural and human environments, and the causes of atmospheric degradation. Since long-range effects and causal elements were hard to establish scientifically, however, the nature of the causal link between human activities and damage should be determined. Furthermore, the expression "likely to have", before the words "significant adverse effects", should be clarified. The first report did not explain why the scope should encompass activities "likely" to have significant adverse effects or why the damage should not be linked to a transboundary element. Neither practice nor case law supported the proposition that the regime for protection of the atmosphere should, like the regimes for human rights, exclude an inter-State element. He shared the concerns expressed by other members in that connection.

12. While the objects of protection could plausibly include both the natural and the human environment, due to the intrinsic relationship between the two, the first report did not clearly delineate the human environment. He therefore welcomed the fact that draft guideline 2 confined the scope of human protection to human life and health.

13. Regarding the legal status of the atmosphere, he endorsed the Special Rapporteur's view that airspace was not an appropriate definition. Although strong arguments were made for defining the atmosphere as a natural resource, including because it was described as such by relevant bodies and in certain environmental instruments, there did not seem to be sufficient evidence in treaties or practice to characterize it as a shared or common natural resource. While he agreed that the basis of any effective protection regime must consist of both preservation and conservation aspects, the extent of the obligations associated with the two aspects was not necessarily the same.

14. Similarly, in his first report, the Special Rapporteur did not provide a sufficient legal basis to conclude that the protection of the atmosphere was a "common concern of humankind". There was no customary rule or emerging norm to that effect, only some legal writings. Furthermore, both General Assembly resolution 43/53 of 6 December 1988 on the protection of global climate for present and future generations of mankind[128] and the United Nations Framework Convention on Climate Change[129] described climate change itself, not protection of the atmosphere from climate change, as the "common concern of humankind", and that description had produced no legal effects in terms of obligations regarding climate change. Describing the protection of the atmosphere as a common concern of humankind would entail obligations, the exact scope of which, and their relationship with those of other existing regimes, would need to be defined. In paragraph 89 of the first report, it was suggested that treating protection as the common concern of humankind entailed the creation of substantive legal obligations on the part of all States to protect the global atmosphere as enforceable *erga omnes*. But *erga omnes* obligations were by definition obligations owed to the

[127] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992*, vol. I: *Resolutions adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigenda), resolution I, annex I .

[128] See paragraph 1 of this resolution.

[129] See the first preambular paragraph.

international community as a whole, and which all States had an interest in protecting. That meant, under the draft articles on the responsibility of States for internationally wrongful acts,[130] that every State was entitled to seek reparations and impose measures against a State that violated the *erga omnes* obligation to protect the atmosphere. He would hesitate to treat atmospheric protection as a common concern of humankind until further substantiation for such treatment was provided, as it would have serious consequences in terms of the legal effects and the scope of legal protection.

15. In conclusion, he recommended the referral of the draft guidelines to the Drafting Committee, on the understanding that the adoption of draft guideline 3, relating to the nature of protection, would be deferred to a future session.

16. Mr. ŠTURMA commended the Special Rapporteur on his well-structured and well-documented first report but said he had serious doubts concerning the content of the report. The Commission's previous experience with a topic relating to the environment, namely transboundary harm, warranted a cautious approach to the new topic. Some aspects of the report seemed to be at odds with the commitments made in the very wise understanding reached the year before and quoted *in extenso* in paragraph 5 of the first report. For example, the reference in paragraph 18 to significant gaps and overlaps in existing conventions, and the suggestion that the Commission should ensure coordination among them, seemed to contradict the limitation in subparagraph (*b*) of the understanding, reproduced in paragraph 5, that the project would not seek to fill the gaps in the treaty regimes. Similarly, the reference in paragraph 26 to the adoption of precautionary approaches overstated the status of the precautionary principle in international law, which was far from clear, unlike that of the principle of prevention, which was *lex lata*.

17. Concerning draft guideline 1, he strongly disagreed with the Special Rapporteur's opinion that the Commission needed to define the atmosphere, not because of the content of the proposed definition, but in terms of the limits of law. The purpose of any legal regulation was to regulate human behaviour that might be in accordance with or in violation of a certain norm. Natural objects and processes could be described by natural sciences, but not regulated by law. The definition of the atmosphere was no more necessary than the definition of the sea. The situation was different, however, for the definition of the legal regimes related to natural resources like the territorial sea, the high seas, the seabed and now, airspace.

18. While he endorsed the thrust of draft guideline 2 (*b*), he had serious problems with the broad character of subparagraph (*a*). The reference to the introduction of deleterious substances or energy into the atmosphere was hardly compatible with the understanding detailed in paragraph 5 of the first report. In addition, the Special Raporteur's intention, stated in paragraph 76, to cover the issues of energy and radioactive or nuclear pollution was unacceptable, for two reasons. First, the peaceful use of nuclear energy and related problems were covered by special treaty regimes. Second, the topic should not in any way limit the right of any sovereign State to decide on its nuclear energy programme, in conformity with its international obligations.

19. Draft guideline 3, which aimed to define the legal status of the atmosphere, was the most important of the three. He accordingly expressed concern about the reference to the "common concern of humankind". If it was merely intended to convey a message about the importance of the protection of the atmosphere, it was acceptable. However, if the intention was to introduce a new legal concept, similar to the common heritage of humankind, that would pose a major problem. Unlike the international regimes to which the latter concept applied, the protection of the atmosphere occurred in the territory and under the jurisdiction of States. They must have the freedom to engage in activities, balanced by the responsibility (obligation) to ensure that any activities conducted under their jurisdiction and control did not cause damage to the environment of other States or areas beyond their national jurisdiction (principle 21 of the Stockholm Declaration[131]).

20. Lastly, he recommended that all the draft guidelines be referred to the Drafting Committee for detailed discussion.

21. Mr. PETER said that the first report conformed to what was to be expected of the Special Rapporteur—industry, excellence, an articulate discussion of the science of the law and practice, and an ability to explain complicated scientific concepts and relate them to international law and human life. In paragraphs 64 to 68 of his first report, he gave the reader a course on the physical characteristics of the atmosphere, drawing attention to the potentially deadly consequences of transboundary pollution, depletion of the ozone layer and the accumulation of greenhouse gas for both the human and the natural environment. In Europe alone during the past year, floods had occurred in several countries, most recently in the Balkans, where the attendant destruction had been compared to that caused 20 years earlier, during the war.

22. That point illustrated the importance of the topic and made it all the more disturbing that the Commission's treatment of it was to be constrained by the stringent conditions of an understanding set out in paragraph 5 of the first report. It was not surprising that the Special Rapporteur tried to interpret that understanding, in the last footnote to that paragraph, in an attempt to break free of the constraints it imposed. He should be afforded greater freedom to handle the topic, especially as the Sixth Committee had commended the Commission for choosing it and venturing into new areas of international law.

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[130] General Assembly resolution 56/83 of 12 December 2001, annex, article 4. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq*., paras. 76–77.

[131] *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. I, p. 3.

23. In addressing the legal status of the atmosphere, the Special Rapporteur brought up, but then dismissed, the concept of the common heritage of humankind. Reference to a common heritage had been made in the Convention for the Protection of Cultural Property in the Event of Armed Conflict,[132] the Agreement governing the activities of States on the moon and other celestial bodies[133] and the United Nations Convention on the Law of the Sea.[134] In the latter two treaties, that notion had been mentioned in relation to the exploitation of resources, but the use of natural resources was not central. Heritage was the key aspect of the term, which normally referred to something inherited from the past that required protection. The atmosphere, which had not always been endangered, had been inherited as a pure space and was now threatened by the products of scientific and technological advances. More thought should therefore be given to the concept of a common heritage before simply dismissing it, particularly since the concept of a "common concern" was too weak.

24. It was premature to talk about setting up a large institution akin to the International Seabed Authority when all that might be needed was an effective watchdog to check on actual or potential abuse of the atmosphere. He would like to know why the Special Rapporteur had omitted any reference to the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal and the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa.

25. Turning to the draft guidelines proposed by the Special Rapporteur, he said that, in draft guideline 1 (*a*), the definition of the term "atmosphere" was too complicated and overly scientific. On the other hand, the definition of "air pollution" contained in the footnote to the end of draft guideline 1 was very apt and should be incorporated as draft guideline 1 (*b*). He fully endorsed draft guideline 2. In draft guideline 3, it would be advisable to simplify the terminology. As he had already explained, the concept of a "common concern of humankind", used in draft guideline 3 (*a*), was too weak for a subject as important as the atmosphere. Guideline 3 (*b*) was unnecessary and merely an attempt by the Special Rapporteur to show that he was strictly abiding by an "understanding" that was of dubious legitimacy and that was even being questioned by some of its former supporters. Notwithstanding his views on draft guidelines 1 and 3, he was in favour of referring all the draft guidelines to the Drafting Committee.

26. Mr. CANDIOTI said that Mr. Peter was right to question the validity of the so-called "understanding": it was a disgrace, signifying a departure by the Commission from its traditional working methods and imposing a number of conditions that curbed the Special Rapporteur's freedom to investigate a subject before he had even started work on it. He endorsed Mr. Peter's suggestion that the Special Rapporteur be freed from any preconditions and allowed to explore all aspects of the topic within the limits of the Commission's normal working methods.

27. Sir Michael WOOD said that the understanding had been adopted by the Commission, and it was on that basis that the Commission had embarked upon the topic. Absent the understanding, the topic was not on the Commission's agenda.

28. Mr. WISNUMURTI said that an understanding of the nature of the atmosphere as a limited natural resource beneficial to humankind was enhanced by the Special Rapporteur's thorough research on the evolution of the relevant international law and the sources of the law. While there was no denying that the topic presented a number of challenges, necessitating the understanding referred to in paragraph 5 of the first report, it was incumbent upon the Commission to make its best effort to complete its work in a constructive spirit. Debate on how the understanding was to be implemented was counterproductive.

29. He agreed with the fourfold goal set out in paragraph 13 of the first report and with the Special Rapporteur's suggestions, in paragraphs 73 and 88, respectively, that the modalities of utilizing the atmosphere should be considered in depth and that the concept of a common concern of humankind should be applied to all issues related to the atmosphere. No State could claim national jurisdiction over any segment of the atmosphere, but that should not prevent the Commission from preparing draft guidelines on the obligations of States to protect the atmosphere from activities by States or natural or juridical persons that released deleterious substances or energy into the atmosphere. Given the unique physical characteristics of the atmosphere, efforts to protect it should be pursued through international cooperation, the modalities and mechanisms for which should be elaborated in the draft guidelines to be submitted in the next report.

30. The definition of "atmosphere" proposed by the Special Rapporteur in draft guideline 1 (*a*) disregarded the complicated process of atmospheric circulation, which should be made into a component of the definition. While he agreed with draft guideline 2 (*a*), which captured the essential scope of the guidelines and recognized the intrinsic relationship between the human and the natural environment, he had some reservations about subparagraph (*b*): the meaning of the phrase "as well as to their interrelationship" was unclear. Although there would have to be a draft guideline that contained and clarified the concept of a "common concern of humankind", draft guideline 3 (*a*) suggested that the Commission was concerned with the protection of the atmosphere, rather than with its protection against degradation. That subparagraph should therefore be rephrased in a manner that was consistent with paragraphs 12 and 88 of the report. He agreed with the formulation of paragraph 3 (*b*) and was in favour of sending all three draft guidelines to the Drafting Committee.

31. Mr. CAFLISCH, referring to the understanding reached at the previous session that the work on the topic should not interfere with relevant political negotiations, said that it was not clear how the Commission could know in advance the content of any future negotiations on the broad range of issues that were relevant to the topic. The

[132] See the second preambular paragraph.

[133] See article 11, paragraph 1.

[134] See, *inter alia*, the sixth preambular paragraph.

same could be said about the stipulation that the topic should not deal with specific substances that were the subject of inter-State negotiations. The exclusion of outer space from the topic was problematic, inasmuch as the boundaries between the various layers of the atmosphere and outer space were not clearly defined. Lastly, the precondition that the project should not seek to fill the gaps in current treaty regimes raised questions as to the scope of the Commission's mandate.

32. He endorsed Mr. Park's request for a road map of the topic and his suggestion that work should focus on acts or omissions of States liable to have a serious impact on the atmosphere, rather than on the atmosphere as such.

33. As Mr. Kittichaisaree had pointed out, the Special Rapporteur's emphasis on the principle of *sic utere* clashed with the "common concern" approach developed elsewhere in the first report. The *sic utere* principle was rooted in the law applicable to relations between neighbouring States. It covered only significant harm caused by or in a State to the atmosphere of a nearby State, and as such, it could not provide a basis for general rules for the protection of the atmosphere.

34. If, on the other hand, the intention was to elaborate a comprehensive protection regime, and not one restricted to relations between neighbours, then it would be necessary to engage in progressive development. While it might seem desirable to seek to protect the atmosphere from all significant harm, regardless of its source, the existing legal standards did not provide a solid foundation for doing so.

35. Given the current uncertainty regarding the plan of work, it might be prudent to defer a decision on the draft guidelines until the Commission's next session. However, should the draft guidelines be referred to the Drafting Committee at the current session, he had a number of suggestions to make. With regard to draft guideline 1, he had no objection to limiting the atmosphere, for the purposes of the project, to the troposphere and the stratosphere, provided that the upper boundary of the latter could be established accurately and, if possible, on the basis of legal elements. Noting that the text of draft guideline 2 was a modified version of article 1, paragraph 4, of the United Nations Convention on the Law of the Sea, he said that he was undecided as to whether its incorporation was appropriate. As to draft guideline 3, he wondered whether it might be preferable to postpone defining the nature of the atmosphere until the Commission had a clearer idea of the regime that it wished to apply.

36. Mr. VÁZQUEZ-BERMÚDEZ said that the Special Rapporteur had taken due account in his first report of the understanding reached at the previous session in order to accommodate the opposition to the inclusion of the item of some members, of whom he himself was not one. However, it was clearly not possible to research the topic without considering the various sources of relevant international law or without referring to specific issues. The understanding should therefore be seen as providing guidance to the Special Rapporteur, and not as a straitjacket.

37. He agreed with the Special Rapporteur concerning the need to adhere exclusively to a legal approach to the topic. The draft guidelines should be normative principles providing helpful guidance to States and promoting the progressive development and codification of international law on the protection of the atmosphere. The Commission should approach the topic in a comprehensive and systematic way and not confine its focus to one or more special regimes.

38. As to the sources relevant to the protection of the atmosphere, he said that the Commission's draft articles on prevention of transboundary harm[135] and its principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities[136] were listed in the report as non-binding instruments, but they should be classified differently, as relevant previous work. Since the domestic legislation of States had been identified as important by the Special Rapporteur insofar as it addressed issues of transboundary harm to and global protection of the atmosphere, he noted that in Ecuador, the obligation of the State to protect the environment was enshrined in the Constitution.[137]

39. Turning to draft guideline 1, he said that the definition of the atmosphere should make no express reference to the troposphere and the stratosphere, so as to align it more closely with the scientific definition. A separate paragraph could be included, indicating that the transport and dispersion of airborne substances occurred in those layers. Alternatively, that clarification could be made in the commentary to the guideline.

40. As indicated in paragraph 72 of the first report, the scope of the draft guidelines should extend only to damage caused by human activities, and as stated in paragraph 75, the objects to be protected must be the natural environment, meaning the composition and quality of the atmosphere, and the human environment, meaning human health and materials useful to humankind, such as natural vegetation and crops. Linkages with other areas of international law must be taken into account, as appropriate. He thought it would be useful to include a savings clause saying that nothing in the draft guidelines affected the legal status of airspace under other conventions.

41. Regarding draft guideline 3, he said that the Special Rapporteur's characterization of the protection of the atmosphere as a "common concern of humankind" was a move in the right direction. As Mr. Petrič had observed,

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[135] See the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 146 *et seq*., paras. 97–98. The articles on prevention of transboundary harm from hazardous activities are reproduced in the annex to General Assembly resolution 62/68 of 6 December 2007.

[136] See the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities adopted by the Commission at its fifty-eighth session and the commentaries thereto in *Yearbook … 2006*, vol. II (Part Two), pp. 58 *et seq*., paras. 66–67. See also General Assembly resolution 61/36 of 4 December 2006, annex.

[137] Constitution of Ecuador, article 391. An English version is available from http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html.

the focus should be on the duty to cooperate to protect the atmosphere and on the recognition that international cooperation for that purpose was required. The notion of the "common concern of humankind", which could be found in, for example, the United Nations Framework Convention on Climate Change, was a developing concept, and the Commission could play a significant role in its elucidation and concrete expression.

42. In conclusion, he expressed his support for the referral of the three draft guidelines to the Drafting Committee.

43. Sir Michael WOOD recalled that there had been strong objections to the inclusion in the agenda of the topic on the protection of the atmosphere, as originally proposed by Mr. Murase in 2011.[138] It was only after extended consultation and negotiation that, on the final day of its previous session, the Commission had decided in favour of its inclusion, and only on the basis of a far-reaching understanding recorded verbatim in the summary record of its 3197th meeting[139] and set out in paragraph 168 of the Commission's report to the General Assembly on the work of its sixty-fifth session.[140] Considering that the understanding had been proposed by the Special Rapporteur himself, it was disturbing that in his first report and his introduction, he appeared to downplay its importance and even perhaps to seek to evade its terms. Sir Michael cautioned strongly against any kind of resetting or even setting aside of the understanding.

44. A reading of the topical summary (A/CN.4/666) of the discussion held in the Sixth Committee in 2013—a discussion largely ignored by the Special Rapporteur in his first report—revealed that some delegations had welcomed the limitations on the scope of the topic, while others had continued to express doubts about the appropriateness of its inclusion in the Commission's programme of work, notwithstanding—or because of—those limitations. As Mr. Forteau, Mr. Park and Mr. Caflisch had noted, what was missing from the first report was a road map. In fact, the report failed to deliver on the promise contained in paragraph 8 to provide "the basis for a common understanding of the basic concepts, objectives and scope of the project".

45. Turning to the draft guideline 1, he agreed with those speakers who considered that there was no need for a definition of the atmosphere at the present stage.

46. As to draft guideline 2, he also agreed with those who questioned the formulation of the first paragraph. Mr. Forteau had identified three types of possible harm to the atmosphere: global harm, such as climate change and ozone depletion; transboundary harm; and purely local harm that crossed no boundary.[141] To date, international law had only addressed the first two types of harm, and in doing so, it had used a variety of rules that were not easily harmonized, and probably should not be harmonized. As to draft guideline 2 (*b*), it was not so much about scope as about the nature of the exercise. According to the Special Rapporteur, the draft guidelines referred to "the basic principles relating to the protection of the atmosphere as well as to their interrelationship", but it was not clear what the Special Rapporteur meant by "basic principles".

47. As to draft guideline 3, he shared the almost universal concern expressed so far about the introduction of the vague concept of the "common concern of humankind". As currently drafted, the implications of the guideline were very far-reaching, since it appeared to define what constituted a "common concern of humankind" in general. The phrase "[t]he atmosphere is a natural resource essential for sustaining life on [E]arth … hence, its protection is a common concern of humankind" seemed to open the door to analogous arguments in relation to many other natural resources that could be deemed "essential for sustaining life on [E]arth".

48. Given all those circumstances, he, like others, was doubtful whether the time was right to refer the draft guidelines to the Drafting Committee. The need for the introductory draft guidelines 1 and 2 had been questioned, and draft guideline 3 was not ripe for the Drafting Committee, since its central element—"common concern"—had been strongly questioned and would clearly not be generally acceptable, at least not without further specification of its potential implications.

49. Mr. KAMTO, referring to the general approach to the topic, said that the Commission should avoid giving the impression of being divided on the issue. Members' statements should be viewed as having been made with the aim of helping the Special Rapporteur to define the topic and facilitating a sound and useful result.

50. Given the topic's highly technical nature, the Commission needed to benefit from the insights of experts. The organization of a seminar on the atmosphere and the threats to it might assist it in better determining both the relevance and the scope of any guidelines it might formulate.

51. For his part, he was currently unable to take a position on the definition of the atmosphere contained in draft guideline 1. Since it seemed to be based mainly on just one glossary, perhaps several other sources should be consulted. It was for scientists, not jurists, to validate the Commission's definition of the atmosphere. The same could be said, at least in part, of draft guideline 2 (*a*). As to the notion of the "common concern of humankind" referred to in draft guideline 3, it should not be disregarded. That notion included the concept of "common heritage" that had guided the United Nations Conference on the Law of the Sea. The Special Rapporteur should carry out further research into the matter, and in his second report, he should provide a more comprehensive picture of the general direction in which he intended the work of the Commission to go.

The meeting rose at 1 p.m.

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[138] *Yearbook … 2011*, vol. II (Part Two), p. 189 *et seq.*, annex II.

[139] *Yearbook … 2013*, vol. I, 3197th meeting, p. 162, para. 31.

[140] *Ibid.*, vol. II (Part Two), p. 78.

[141] See the 3211th meeting above, p. 57, para. 29.

3213th MEETING

Friday, 30 May 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Protection of persons in the event of disasters (*concluded*)* (A/CN.4/666, Part II, sect. C, A/CN.4/668 and Add.1, A/CN.4/L.831)

[Agenda item 4]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. SABOIA (Chairperson of the Drafting Committee) presented the text and titles of draft articles 1 to 21, which comprised the entire set of draft articles on the protection of persons in the event of disasters as provisionally adopted on first reading by the Drafting Committee. Since several draft articles which had already been provisionally adopted by the Commission had been moved and therefore renumbered, their previous number was shown in square brackets. The draft articles contained in document A/CN.4/L.831 read:

Article 1 [1]. Scope

The present draft articles apply to the protection of persons in the event of disasters.

Article 2 [2]. Purpose

The purpose of the present draft articles is to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights.

Article 3 [3]. Definition of disaster

"Disaster" means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.

Article 4. Use of terms

For the purposes of the present draft articles:

(*a*) "affected State" means the State in the territory or otherwise under the jurisdiction or control of which persons, property or the environment are affected by a disaster;

(*b*) "assisting State" means a State providing assistance to an affected State at its request or with its consent;

(*c*) "other assisting actor" means a competent intergovernmental organization, or a relevant non-governmental organization or any other entity or individual external to the affected State, providing assistance to that State at its request or with its consent;

(*d*) "external assistance" means relief personnel, equipment and goods, and services provided to an affected State by assisting States or other assisting actors for disaster relief assistance or disaster risk reduction;

(*e*) "relief personnel" means civilian or military personnel sent by an assisting State or other assisting actor for the purpose of providing disaster relief assistance or disaster risk reduction;

(*f*) "equipment and goods" means supplies, tools, machines, specially trained animals, foodstuffs, drinking water, medical supplies, means of shelter, clothing, bedding, vehicles and other objects for disaster relief assistance or disaster risk reduction.

Article 5 [7]. Human dignity

In responding to disasters, States, competent intergovernmental organizations and relevant non-governmental organizations shall respect and protect the inherent dignity of the human person.

Article 6 [8]. Human rights

Persons affected by disasters are entitled to respect for their human rights.

Article 7 [6]. Humanitarian principles

Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable.

Article 8 [5]. Duty to cooperate

In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, and with the United Nations and other competent intergovernmental organizations, the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organizations.

Article 9 [5 bis]. Forms of cooperation

For the purposes of the present draft articles, cooperation includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources.

Article 10 [5 ter]. Cooperation for disaster risk reduction

Cooperation shall extend to the taking of measures intended to reduce the risk of disasters.

Article 11 [16]. Duty to reduce the risk of disasters

1. Each State shall reduce the risk of disasters by taking the necessary and appropriate measures, including through legislation and regulations, to prevent, mitigate and prepare for disasters.

2. Disaster risk reduction measures include the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems.

Article 12 [9]. Role of the affected State

1. The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory.

2. The affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance.

Article 13 [10]. Duty of the affected State to seek external assistance

To the extent that a disaster exceeds its national response capacity, the affected State has the duty to seek assistance from among other States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations, as appropriate.

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* Resumed from the 3201st meeting.

Article 14 [11]. Consent of the affected State to external assistance

1. The provision of external assistance requires the consent of the affected State.

2. Consent to external assistance shall not be withheld arbitrarily.

3. When an offer of assistance is extended in accordance with the present draft articles, the affected State shall, whenever possible, make its decision regarding the offer known.

Article 15 [13]. Conditions on the provision of external assistance

The affected State may place conditions on the provision of external assistance. Such conditions shall be in accordance with the present draft articles, applicable rules of international law, and the national law of the affected State. Conditions shall take into account the identified needs of the persons affected by disasters and the quality of the assistance. When formulating conditions, the affected State shall indicate the scope and type of assistance sought.

Article 16 [12]. Offers of external assistance

In responding to disasters, States, the United Nations and other competent intergovernmental organizations have the right to offer assistance to the affected State. Relevant non-governmental organizations may also offer assistance to the affected State.

Article 17 [14]. Facilitation of external assistance

1. The affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance regarding, in particular:

(*a*) civilian and military relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement; and

(*b*) equipment and goods, in fields such as customs requirements and tariffs, taxation, transport and disposal thereof.

2. The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law.

Article 18. Protection of relief personnel, equipment and goods

The affected State shall take the appropriate measures to ensure the protection of relief personnel, equipment and goods present in its territory for the purpose of providing external assistance.

Article 19 [15]. Termination of external assistance

The affected State and the assisting State, and as appropriate other assisting actors, shall consult with respect to the termination of external assistance and the modalities of termination. The affected State, the assisting State or other assisting actor wishing to terminate shall provide appropriate notification.

Article 20. Relationship to special or other rules of international law

The present draft articles are without prejudice to special or other rules of international law applicable in the event of disasters.

Article 21 [4]. Relationship to international humanitarian law

The present draft articles do not apply to situations to which the rules of international humanitarian law are applicable.

2. He would confine his comments to amendments made to the draft articles proposed by the Special Rapporteur at the current session, in other words draft articles 3 *bis*, 14 *bis*, 17 and 19, since the text of those already previously adopted by the Commission had been amended only very slightly.

3. Former draft article 3 *bis*, which had become draft article 4, had been recast in light of the numerous comments made on it during plenary sessions. The definitions of the terms "relevant non-governmental organization" and "risk of disasters" had been deemed unnecessary and had therefore been deleted, while that of "affected State", in subparagraph (*a*), had been extended to cover disasters in a territory or area "otherwise under the jurisdiction or control" of a State. The Drafting Committee had been of the opinion that this wording did not contradict draft article 12 [9], although the latter mentioned only the territory of the affected State. In the exceptional case of a disaster striking two States, one whose territory was affected and one that exercised *de jure* jurisdiction or *de facto* control over the territory, the matter of knowing which of those States had to consent to outside assistance, if there was no specific agreement between them, was not settled by draft article 14 [11] as it stood, but the Drafting Committee considered it preferable to revisit that point on second reading. A reference to the environment had been inserted in the definition at several members' request. Subparagraphs (*b*) and (*c*) had been amended mainly for the sake of consistency. The proposal not to state expressly that the other assisting actors were "external" to the affected State and to say only that they supplied "external assistance" had been rejected, since that wording might have given the impression that a domestic actor receiving assistance from abroad came within the purview of the draft articles, whereas it had been agreed that they did not apply to the activities of domestic actors. Some members of the Drafting Committee had been of the view that it would have been better to deal with that question in the definition of external assistance in subparagraph (*d*), which had been simplified, since the notion of "needs" had already been mentioned in draft article 2. The Drafting Committee had thought about deleting what appeared to be the relatively well-understood definition of "relief personnel", from subparagraph (*e*) (formerly (*g*)), but had finally decided to retain it in order to make it clear that this personnel could be civilian or military. The adjective "specialized" had been deleted, but the commentary would explain that personnel sent to provide assistance generally had the requisite expertise. A similar explanation would be given with regard to "necessary equipment and goods", the reference to which had been deleted from the definition, since it had been feared that it would prove too restrictive in practice. Lastly, the commentary would state that the expression "other objects" in the definition of "equipment and goods" in subparagraph (*f*) (formerly (*e*)) indicated that the list was not exhaustive. The proposal to include a separate definition of "necessary services" had not been retained, since that term did not appear in the draft articles.

4. In former draft article 14 *bis*, which had become draft article 18, the expression "all necessary measures" (in other words, the measures that had to be taken to protect relief personnel, equipment and goods) had been replaced with "the appropriate measures" in order to avoid placing too heavy a burden on the affected State. The commentary would make it plain that this obligation was one of conduct and not of result. Although the measures that had to be adopted were described as "necessary" in draft articles 17 [14] and 11 [16], the actions referred to therein could be regarded as falling more within the competence of the State than those that were expected under draft

article 18. The proposal to deal with the duty to protect in two separate paragraphs depending on whether it applied to State or non-State actors, had not been retained, but the commentary would make it clear that the term "appropriate measures" enabled the affected State to establish different levels of obligations according to the object of protection and would explain how the provision applied to the various categories of relief personnel. Similarly, although it had been suggested that draft articles 18 and 17 [14] be merged, because the protection referred to in the former was included in the general obligation to facilitate external assistance mentioned in the latter, that proposal had been regarded as rather inadvisable for, as stated previously, the duties in question in the two provisions were different in nature.

5. The contents of former draft articles 17 and 18 proposed by the Special Rapporteur had quite simply been encapsulated in a standard "without prejudice" clause in new draft article 20 concerning the draft articles' relationship with special or other rules of international law. The term "special rules" meant the other, mainly treaty-based, rules applicable "in the event of disasters", to echo the wording of the first draft article, but also the rules of customary international law. The expression "other rules" referred to the rules of international law that might apply, even if they did not directly concern disasters. The draft articles were therefore without prejudice to those various rules, but conversely they applied in the absence of those rules. Pursuant to draft article 21 [4] they would likewise apply, for example, when a disaster occurred in an area of armed conflict, to the extent that this area was not covered by international humanitarian law. That point would be elaborated in the commentary. The Drafting Committee had not retained former draft article 19 on the draft articles' relationship to the Charter of the United Nations, as it had been unable to reach consensus on its adoption.

6. The CHAIRPERSON invited the members of the Commission to adopt, draft article by draft article, the document published under the symbol A/CN.4/L.831, which contained all the draft articles on the protection of persons in the event of disasters that the Drafting Committee had provisionally adopted on first reading.

Draft article 1. Scope

Draft article 1 was adopted.

Draft article 2. Purpose

Draft article 2 was adopted.

Draft article 3. Definition of disaster

Draft article 3 was adopted.

Draft article 4. Use of terms

7. Mr. PARK, noting that, in the French version, subparagraph (*a*) defined the term *État touché*, said that it should be brought into line with the terminology used in all the draft articles, namely *État affecté*.

It was so decided.

Draft article 4 was adopted.

Draft article 5. Human dignity

Draft article 5 was adopted.

Draft article 6. Human rights

Draft article 6 was adopted.

Draft article 7. Humanitarian principles

Draft article 7 was adopted.

Draft article 8. Duty to cooperate

Draft article 8 was adopted.

Draft article 9. Forms of cooperation

Draft article 9 was adopted.

Draft article 10. Cooperation for disaster risk reduction

Draft article 10 was adopted.

Draft article 11. Duty to reduce the risk of disasters

Draft article 11 was adopted.

Draft article 12. Role of the affected State

Draft article 12 was adopted.

Draft article 13. Duty of the affected State to seek external assistance

Draft article 13 was adopted.

Draft article 14. Consent of the affected State to external assistance

Draft article 14 was adopted subject to a minor editorial amendment to the English version.

Draft article 15. Conditions on the provision of external assistance

Draft article 15 was adopted.

Draft article 16. Offers of external assistance

Draft article 16 was adopted.

Draft article 17. Facilitation of external assistance

Draft article 17 was adopted.

Draft article 18. Protection of relief personnel, equipment and goods

8. Mr. NOLTE proposed that the commentary make clear that the expression "present in its territory" also included personnel, equipment and goods "under the jurisdiction or control" of the affected State, in accordance with the definition provided in draft article 4 (*a*).

The proposal was adopted.

Draft article 18 was adopted.

Draft article 19. Termination of external assistance

Draft article 19 was adopted.

Draft article 20. Relationship to special or other rules of international law

Draft article 20 was adopted.

Draft article 21. Relationship to international humanitarian law

Draft article 21 was adopted.

The draft articles contained in document A/CN.4/L.831, as a whole, as amended, were adopted.

Protection of the atmosphere (*continued*) (A/CN.4/666, Part II, sect. I, A/CN.4/667)

[Agenda item 11]

First report of the Special Rapporteur (*continued*)

9. The CHAIRPERSON invited the members of the Commission to resume their consideration of the Special Rapporteur's first report on the protection of the atmosphere (A/CN.4/667).

10. Mr. NOLTE said that the scope of the topic of the protection of the atmosphere was circumscribed by the basic understanding underpinning the Commission's decision to include that topic in its programme of work. That understanding had to be taken seriously, regardless of whether one approved of its contents. He had always been in favour of including the topic in the Commission's programme of work. He did not think that those members who had had reservations in that respect, but who had demonstrated their readiness to compromise by accepting the understanding, had intended to limit the topic's scope unreasonably by requiring that any study of it be subject to the conditions established in the understanding.

11. Everyone agreed that the protection of the atmosphere was extremely important for humankind. It was equally undeniable that dramatic forms of climate change were taking place. He was deeply convinced that everyone should work together to preserve the vital basis of human existence on Earth. The Commission's primary task was not, however, to say what it thought needed to be done to protect the atmosphere, but rather to ask what role it should play in the overall common endeavour to protect the atmosphere and what its contribution might properly be in that connection. When asking that initial question, the Commission members must be honest and modest and they should recognize that the Commission could not save the atmosphere simply by virtue of its legal authority and the collective wisdom of its members. The most important decisions with regard to the protection of the atmosphere must be taken at the political level; the Commission could neither prescribe specific decisions or measures on the matter, nor compensate for the lack thereof. That was the basic reason why the members of the Commission had set some limitations on the study of the topic when the understanding had been formulated. It was also necessary to bear in mind the fact that the Commission would jeopardize its own authority if it overstepped its role in that area. It took a long time to establish authority, but often very little to lose it.

12. Some members regarded the understanding as a straitjacket that placed the Special Rapporteur in an impossible situation of not being able really to address the important issues raised by the topic. That was not the case, since the understanding left a margin of manoeuvre sufficient to identify the general principles of international environmental law and to say that they applied to the protection of the atmosphere. The identification of existing law could not be seen as exerting pressure on treaty negotiations, or as "filling gaps" between treaty regimes. What already existed between treaty regimes could not be considered to be a form of "filling in". The identification of general principles of international environmental law, irrespective of whether they were based on customary law or on a general principle of law, was a regular and legitimate function of the Commission and there was nothing in the understanding to prevent that. The Commission might not go very far in that task, but that modest goal was worth pursuing.

13. The understanding did leave the Commission enough room to set forth some general principles and to establish their applicability to the protection of the atmosphere. He therefore supported draft guideline 2 (*b*) which said just that. The Special Rapporteur and the Commission should seek to achieve the programme inherent in that draft guideline. In pursuing that goal, it might be wise, for example, to emphasize States' duty to cooperate in protecting the environment, as Mr. Petrič and other members had suggested.

14. His views on the other draft guidelines stemmed from the basic position that he had just outlined. He agreed with other members, such as Mr. Forteau, that the Special Rapporteur had put the cart before the horse. More importantly, it was premature to propose a draft guideline which already proclaimed that the atmosphere, by virtue of its legal status, was a "common concern of humankind". Of course, the protection of the atmosphere was a "common concern" in the colloquial sense of the term, but everyone knew how important it was for the meaning and implications of a term to be reasonably clear once it was supposed to describe something with "legal status". Perhaps the Special Rapporteur should hold draft guideline 3 in abeyance and, in his next report, begin to elaborate on the above-mentioned general principles of international environmental law. The notion of a "common concern" should not be debated again until those principles, as they applied to the protection of the atmosphere, had been articulated, at which point it might become a suitably-sized horse to draw the cart.

15. He agreed with the members who considered draft guideline 1 (*a*) on the definition of the atmosphere to be unnecessary and draft guideline 2 (*a*) to be misleading. As it stood, the draft guideline concerned not only scope, as its title indicated, but also referred to some substantive concepts, such as "deleterious substances" or "significant adverse effects", which should be considered in connection with substantive obligations. Why should the definition of scope be burdened with such notions, which it would be better to discuss at the same time as the general principles related to their role?

16. The protection of the atmosphere was a very important topic where the Commission had to play a crucial, albeit limited, role, which consisted of reminding States that the protection of the atmosphere was not a field governed solely by the law of a few treaties. He therefore proposed that the Special Rapporteur and the Commission consider the first report and the first debate in plenary session to be a valuable introduction to the topic, but they

should not seek the provisional adoption of any draft guideline at that stage, apart from draft guideline 2 (*a*). Proceeding in that manner would promote the sustainability and development of the topic. He made this suggestion as a friend of the topic, in a friendly spirit towards the Special Rapporteur, and as a Commission member who was concerned about the Commission's role and authority and about the protection of the atmosphere.

17. Mr. VALENCIA-OSPINA said that he wished to make three general comments. First, the Special Rapporteur, by reinterpreting existing legal concepts, principles and rules, might unintentionally and indirectly attempt to fill gaps in the existing regime for the protection of the atmosphere. Second, by singling out, for the purposes of the draft guidelines, only those principles and rules that pertained exclusively to the protection of the atmosphere, he was forgetting that most of the principles of international environmental law, such as the principle of prevention, the "polluter pays" principle and the precautionary principle, also applied if the atmosphere were considered to be an inseparable part of the environment. Third, the approach adopted by the Special Rapporteur in paragraph 75 of the first report appeared to confuse the direct object of protection, namely the atmosphere, with the indirect object, namely the natural and human environment.

18. The definition of the atmosphere set forth in the draft guideline 1 was a useful starting point, but it would be preferable to extend it to the mesosphere and thermosphere because, on the one hand, the atmosphere had no upper limit and therefore no precise boundary with outer space and, on the other hand, technological progress might one day lead to devices capable of flying above the stratosphere and they must be covered.

19. As far as draft guideline 2 was concerned, he agreed with Mr. Hassouna that it unnecessarily restricted the scope of the draft guidelines. By stating that the human activities in question were those that had significant adverse effects on human life and health and the Earth's natural environment, it excluded activities which, although they released deleterious substances or energy into the atmosphere, or altered its composition, did not have significant adverse effects on human life and health or the Earth's natural environment, as well as activities whose effects were still unknown. For that reason, contrary to the Special Rapporteur's intentions, activities that might alter atmospheric conditions with highly unpredictable secondary effects might not be covered. That situation could be avoided by adding the word "intentionally" before "alter" in subparagraph (*a*). Furthermore, there might be a contradiction between the purpose of the draft guidelines, which was to protect the natural environment, including the composition and quality of the atmosphere, and subparagraph (*a*), which excluded from the scope of the draft guidelines human activities that altered the atmosphere but which did not have any major adverse effects on human life and health or on the Earth's natural environment. It would be better to include those activities in the scope of the draft guidelines and to protect the atmosphere *per se* rather than to restrict the scope to activities that might have adverse effects on the human or natural environment. For that reason, the phrase "and that have or are likely to have significant adverse effects on human life and health and the [E]arth's natural environment" could be deleted.

20. Draft guideline 2 (*b*) did not fully reflect the Special Rapporteur's aim, because it referred to the basic principles relating to the protection of the atmosphere without saying anything about their relationship with other rules and principles of international environmental law, other specialized areas of international law or general international law. With reference to draft guideline 3, it should first be noted that it could not be inferred from subparagraph (*b*) that activities in airspace, irrespective of whether they fell under the jurisdiction of a State, were not covered by the draft guidelines and, second, with regard to activities conducted in areas outside the jurisdiction of States, for example on the high seas or in Antarctica, that issues of extraterritorial jurisdiction might arise. He recommended that a more in-depth examination be made of the relationship between customary principles of international environmental law, such as the principle of prevention, the principle of cooperation and the duty to conduct environmental impact assessments of transboundary projects, and regulations regarding the atmosphere. He drew particular attention to the difference between the principle *sic utere tuo ut alienum non laedas* and the principle of prevention, which must not be muddled. In conclusion, it would be wiser to look more closely at the issues raised by the topic before referring the draft guidelines to the Drafting Committee. That was especially true of draft guideline 1. He invited the Special Rapporteur to draw up a road map showing how he intended to address the topic.

21. Ms. ESCOBAR HERNÁNDEZ said that, while she believed that she understood the Special Rapporteur's concern when he stated, in paragraph 15 of the first report, that the Commission would adhere exclusively to a legal approach, that statement was unnecessary in view of the Commission's terms of reference, even though it was impossible to draw a clear-cut distinction between the legal and political aspects of the topic. The information regarding the way forward, provided in paragraphs 91 and 92, was insufficient. The Special Rapporteur should list what he deemed to be the priority issues in a road map and should say how he intended to address them. While it would be useful to have a dialogue with the representatives of relevant intergovernmental organizations, given the scientific and technical dimension of the topic, it would also be helpful to have a glossary of the terminology used, which could be annexed to the draft guidelines. The first report did, however, contain copious information about treaty practice in relation to the protection of the atmosphere which appeared to be of little relevance to the topic. For example, although the Council of the European Union directives,[142] to which reference was made in paragraph 30, were predicated on the Treaty on European Union and the Treaty on the Functioning of the European Union, they could not be regarded under any circumstances as binding treaty-based standards. Similarly, it was unclear why

[142] See J. H. Jans and H. H. B. Vedder, *European Environmental Law: After Lisbon*, 4th ed., Groningen, Europa Law Publishing, 2012, pp. 419–430.

the Commission's previous work directly or indirectly related to the protection of the atmosphere was mentioned in a section of the first report on non-binding instruments.

22. As far as draft guideline 1 was concerned, while it was helpful to define the notion of "atmosphere" for the purposes of the draft directives, it might be unwise to do so in a separate draft text, if the Commission wished to cleave to purely scientific and technical considerations, especially as it was doubtful whether it was necessary for the definition to encompass all four layers of the atmosphere. In draft guideline 2, she had no objection to using the notion of "scope", although it was generally employed by the Commission in draft articles, not draft guidelines. That being so, the elements in subparagraph (*a*) were insufficient to constitute what was generally understood by the term "scope". In draft guideline 3, both the meaning and legal scope of the notion "common concern of humankind" were problematic. The explanations provided in the first report suggested that the expression referred more to a worry of the international community than to a genuine legal principle which had the effect of placing States under an obligation *erga omnes* to protect the atmosphere. While the emergence of such an obligation was certainly desirable, there was no basis for concluding that it existed. In view of the foregoing, it would be premature to refer the draft guidelines to the Drafting Committee.

23. Mr. CANDIOTI said that, since it was well established that it was essential to protect the atmosphere, in other words breathable air, as a vital resource for humankind, it was to be hoped that the Commission's work would result in the clarification and systematization of the principles of international environmental law which had to be respected, fleshed out and applied to that end. When the General Assembly, of which the Commission was a subsidiary organ, had taken note of the inclusion of that new topic in the Commission's programme of work,[143] it had not mentioned the informal understanding of 2013. It would certainly have made express reference to it, if it had considered it advisable to make the treatment of the topic subject to certain conditions. Moreover, as several members had commented, it was not the practice of the Commission, which worked in a spirit of harmony and tolerance, to encase its special rapporteurs in a straitjacket or to impose strictures on them in advance.

24. The goals of the draft guidelines, as set by the Special Rapporteur, while respecting the need not to interfere in political matters, something which the Commission always endeavoured to avoid, seemed fit for a subject that was of immediate interest on account of the worsening effects of natural disasters linked to atmospheric degradation caused by human activities, as described earlier. Coherent, exhaustive systematization, in the form of normative guidelines, of the general principles governing the subject matter might help to advance and consolidate that new dimension of international law. While the focus had to be on the purely legal implications of issues related to the atmosphere, the Special Rapporteur had rightly emphasized the need to cover their technical aspects as well. The suggestion put forward by a number of members that a meeting with scientists be organized at the next session was therefore welcome.

25. The definition proposed in draft guideline 2 seemed to be well founded, as only the troposphere and stratosphere were composed of air and affected by degradation resulting from human activities. Some members had, however, rightly considered that it might be unwise for the Commission to confine its consideration of the topic to those lower levels in view of technological progress and the growing impact of human activities.

26. He shared the reservations expressed earlier with regard to the notion of the "common concern of humankind" and the content of draft guideline 3 (*a*), which was less an attempt to define the legal status of the atmosphere, which would require more in-depth consideration, and more a restatement that the protection of the atmosphere, as an essential natural resource, formed the subject of a common concern of humankind. The notion of "common heritage of humankind" proposed by one Commission member as a description of the atmosphere might be an interesting starting point, provided that it was remembered that the Antarctic legal regime was special in that it did not exclude classic sovereign rights.

27. He would leave it to the Special Rapporteur to decide whether to refer the draft guidelines to the Drafting Committee. The various proposals made during debates that the Commission's work in the future should tend either towards the drawing up of general principles or towards the development of the principle of international cooperation were interesting.

28. Mr. SINGH said that, given the diverging views expressed with regard to the criteria set by the 2013 understanding, it was crucial that the Commission proceed with its work constructively and give it enough substance to make a meaningful contribution to the codification and development of that important subject. As Mr. Wisnumurti had said, it would be advisable for the Special Rapporteur to propose a more precise road map or programme of work and to give priority to formulating draft guidelines related to the basic principles of protecting the atmosphere, in other words States' general obligations in that respect, as part of the goals set out in paragraph 13 of the first report.

29. It was regrettable that the definition proposed in draft guideline 1 disregarded the higher levels of the atmosphere and, although the criterion of a "layer of gases" might make for a better understanding of the subject at the scientific level, it was out of place in that definition which, for the reasons stated earlier, might be unnecessary. The scope of the draft guidelines, as defined in draft guideline 2, seemed apposite. On the other hand, the notions "common concern of humankind" and "common heritage" required clarification in order to ascertain whether they applied to the protection and preservation of the atmosphere, as opposed to its exploitation. The statement that the notion of a common concern would certainly lead to the creation of obligations *erga omnes*

[143] See paragraph 6 of General Assembly resolution 68/112 of 16 December 2013.

also needed further examination. With those reservations, he was in favour of referring the draft guidelines to the Drafting Committee.

30. Mr. WAKO said that the Special Rapporteur, guided by his enthusiasm for the subject, had managed in his first report to make headway along the rocky path mapped out by the 2013 understanding. The Special Rapporteur had taken due account of the concerns expressed by some States in the Sixth Committee about the technical nature of the subject matter and those of the members who deemed the Commission's scientific and technical knowledge to be inadequate, and he had proposed that the Commission should consult some experts as it had done in the past. Those consultations should be held at an early stage, otherwise it would be impossible to adopt a position on the proposed definition of the atmosphere. It would be undesirable to forgo a definition of the atmosphere that would, however, have to be scientific. Although the reasons for restricting that definition to the two lower layers of the atmosphere appeared to be justified, the exclusion of the other two layers might complicate work in other bodies, such as the United Nations Committee on the Peaceful Uses of Outer Space.

31. The member States of the Asian–African Legal Consultative Organization (AALCO) had emphasized the importance of including the topic of the protection of the atmosphere in the Commission's programme of work, since that protection was rendered all the more urgent by the fact that in many respects humanity depended on the conservation of the atmosphere's quality. The understanding from 2013 had made it possible to break the deadlock, and several States that had previously had substantial reservations about the topic had revised their position, after what they considered to be a "wise precaution" had been taken. It was to be hoped that it would no longer be necessary to have recourse to that unusual procedure in the future. The Commission would currently have to make the best of it and not interpret the understanding so restrictively that constant questioning of the Special Rapporteur's faithfulness to its terms killed off the project. The flexible interpretation proposed by the Special Rapporteur was therefore appropriate.

32. Paragraphs 13 and 92 of the first report set out a programme of work on which the Special Rapporteur could base himself in the future. While Mr. Wako personally shared the reservations expressed by a number of members concerning the approach chosen, the clarity and the wording of the draft guidelines, the Special Rapporteur would undoubtedly dispel those reservations in his subsequent reports. He was therefore in favour of referring the draft guidelines to the Drafting Committee, on the understanding that draft guideline 1 might be altered in light of the opinions of the experts who would be consulted, and that the notions of a common concern or common heritage of humankind would be subject to more in-depth consideration. He would support whatever decision was taken by the Special Rapporteur on the referral of each of the draft guidelines to the Drafting Committee.

The meeting rose at 1.05 p.m.

3214th MEETING

Tuesday, 3 June 2014, at 10 a.m.

Chairperson: Ms. Concepción ESCOBAR HERNÁNDEZ (Vice-Chairperson)

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti.

Expression of sympathy in connection with the disappearance of Malaysia Airlines flight MH370

1. Mr. HUANG said that the loss of Malaysia Airlines flight MH370 had been an incident of virtually unprecedented gravity: 330 passengers and crew members, citizens of 13 different countries, had been on board. The Governments of China and Malaysia reiterated their will to continue the search for the aircraft and to investigate the causes for its loss. They acknowledged their responsibility to all the passengers and flight attendants and to the international community as a whole.

2. The CHAIRPERSON requested Mr. Huang, in his capacity as Chinese Ambassador to Malaysia, to convey the Commission's condolences to the Chinese authorities, the Chinese people and, in particular, to the families of the passengers and crew of the aircraft. She hoped that the investigations would soon shed light on the fate of Malaysia Airlines flight MH370.

Protection of the atmosphere (*concluded*) (A/CN.4/666, Part II, sect. I, A/CN.4/667)

[Agenda item 11]

First report of the Special Rapporteur (*concluded*)

3. Mr. HUANG said that the three draft guidelines proposed in the Special Rapporteur's first report (A/CN.4/667) touched on some fundamental issues, including the definition and legal status of the atmosphere. However, those matters required more thorough study before any guidelines could be properly formulated. Depletion of the ozone layer, long-range air pollution and protection of the atmosphere were all processes that were still imperfectly understood. He hoped that the Special Rapporteur would conduct more in-depth research and that his second report would address the concerns expressed during the current debate. For those reasons, he believed it was too early to establish a Drafting Committee to discuss the draft guidelines.

4. Mr. MURASE (Special Rapporteur), summing up the debate, said that the detailed comments made by 24 speakers—nearly the entire membership of the Commission—attested to the importance of the topic. Two

members had drawn attention to the dire consequences of atmospheric pollution, and all had acknowledged the urgent need to deal with the protection of the atmosphere. Despite the generalized interest in the project and the high expectations that surrounded it, the Commission's role, as a juridical body, must be a limited one, as one speaker had pointed out. However, he himself believed that as long as the Commission handled the issue with restraint and sensitivity, its concern over the pressing problem of atmospheric degradation would resonate worldwide.

5. Three members considered that his approach strayed from the understanding reached at the Commission's sixty-fifth session, which they read as prohibiting him from mentioning topics that formed the subject of certain political negotiations. Few other members interpreted the understanding so stringently, however, and while some had expressed concerns, they were much less far-reaching. He personally did not see how a discussion in the Commission on air pollution, ozone depletion and climate change could interfere with the political negotiations thereon. Paragraphs 25, 26 and 68 of his first report were intended as background information and not as substantive opinions on those three issues, let alone as interference with current political negotiations. Three members of the Commission had been highly critical of the understanding, and six had taken the view that it should be regarded as a guide and not a straitjacket. In view of those divided opinions, a middle-of-the-road approach would seem to be advisable. The understanding should not be discarded, but a flexible interpretation of its terms should be used, allowing him to mention the three issues but not to deal with them specifically in the draft guidelines.

6. Some members had contended that his first report did not provide sufficient information on where the Commission should be going with the topic, and they had requested a more detailed road map. Paragraph 92 of his first report did supply a complete workplan for the remaining two years of the current quinquennium and suggested that international cooperation, compliance, dispute settlement and interrelationships might be areas of work in the period 2017–2021. There was a consensus within the Commission on the fact that international cooperation was a key element of atmospheric protection. In his second report, he intended to identify States' substantive responsibilities for protecting the atmosphere, possibly including the performance of environmental impact assessments. With regard to compliance, the emphasis would be on a promotional and facilitative approach, rather than on establishing enforcement measures for non-compliance. Questions of evidentiary proof and the standard of review would be discussed in relation to dispute settlement mechanisms. Lastly, the interrelationships between the protection of the atmosphere and other relevant areas of international law, including the law of the sea, biodiversity, international trade law and human rights law, might be studied.

7. Turning to draft guideline 1, he explained that it contained a working definition of the atmosphere solely for the purposes of the Commission's project. Some members had questioned the desirability of a definition at all, pointing out that numerous instruments related to atmospheric protection did not actually define the atmosphere. However, any attempt to articulate guidelines could only benefit from a clear understanding of what the guidelines sought to protect. He agreed that, in framing a definition of the atmosphere, it might be advisable for the Committee to consult scientific experts. He therefore intended to explore the possibility of organizing a workshop or seminar at the following session.

8. Several members had wondered whether to include the upper atmosphere in the definition contained in draft guideline 1. The distinction between the upper and lower atmosphere was anything but arbitrary, since the upper atmosphere comprised only an insignificant portion of the atmosphere's total mass. Furthermore, there was no meaningful evidence that climate change contributed to, or was responsible for, alterations in the condition of the mesosphere or thermosphere, which made up the upper atmosphere. The Antarctic Program of the Government of Australia,[144] which Mr. Kittichaisaree had mentioned, had ascribed changes in the mesosphere to solar flux and not to climate change within the meaning of article 1, paragraph 2, of the United Nations Framework Convention on Climate Change. Since an understanding of changes in the upper atmosphere was limited by a lack of scientific data, any attempt to formulate a protective regime for that part of the atmosphere would be overly ambitious, and it would be inappropriate for the Commission to address such a highly technical and poorly understood issue. The environmental harm caused by satellites in the upper atmosphere was also a different question requiring separate treatment. The environmental protection of outer space was not part of the topic and had already been discussed by the United Nations Committee on the Peaceful Uses of Outer Space.

9. Mr. Murphy's reasoning that the exclusion of the upper atmosphere from the definition in draft guideline 1 implied that outer space began approximately 50 km above the Earth's surface, at the edge of the mesosphere, rested on the erroneous premise that the notions of the atmosphere and airspace were inseparably linked, whereas they were two entirely different concepts in international law. Defining the limits of the atmosphere had no implications for the borders of national airspace or of outer space, and the exclusion of the mesosphere and thermosphere from the definition therefore had no bearing on the delimitation of the perimeters of outer space. He also believed, unlike one speaker, that a definition of the atmosphere could be developed without strictly identifying its upper limit; if the atmosphere was understood to be the envelope of gases surrounding the Earth, then its definition should be limited to the lower atmosphere where those gases were present. He was, however, willing to defer to the Commission's judgment and to remove the reference to the troposphere and stratosphere from the definition in draft guideline 1, provided that the commentary clarified the atmosphere's relationship with outer space.

10. Turning to draft guideline 2 and to the concerns of three speakers regarding the scope of the project, he said it was limited to protection against transboundary pollution and pollution with a global impact. It did not include protection against domestic pollution or harm at the local level.

[144] See the website of the Antarctic Program of the Government of Australia: www.antarctica.gov.au.

11. As to the term "deleterious substances" in draft guideline 2 (*a*), criticised by some members as being too broad, he observed that the subsequent qualifying phrase, "that have or are likely to have significant adverse effects", aptly narrowed its scope. With regard to comments regarding the need to articulate more clearly the sense in which the word "significant" was used in that phrase, he pointed out that the Commission had used the word previously without providing a definition, for instance, in the draft articles on prevention of transboundary harm from hazardous activities.[145] He drew attention to the discussion of the term "significant" in paragraphs (4) and (7) of the commentary to draft article 2 of the 2001 text.[146]

12. It had been suggested that the term "energy" in draft guideline 2 (*a*) be removed or restricted so as to exclude radioactive and nuclear emissions. However, he considered that its retention was important. Its use in the context of pollution was not unprecedented in international law: for example, it appeared in the United Nations Convention on the Law of the Sea and in the Convention on long-range transboundary air pollution. Furthermore, the Fukushima nuclear disaster was a powerful reminder of the potential dangers of nuclear and radioactive pollution.

13. Responding to the argument that the inclusion of substantive concepts such as "deleterious substances" or "significant adverse effects" in a draft guideline describing a project's scope was inappropriate, he said that such a practice was consistent with the Commission's previous work. A similar approach had been adopted in the draft articles on prevention of transboundary harm, in which substantive concepts such as "risk", "harm" and "significant harm" had been incorporated into the article on scope.[147]

14. With regard to draft guideline 3, he noted that many members had voiced concerns about framing the protection of the atmosphere as a "common concern of humankind". However, as Mr. Kittichaisaree had pointed out, the term's narrow application in the draft guideline made clear that it was not the atmosphere, but rather the protection of the atmosphere, that was a common concern. The project sought to establish a cooperative framework for atmospheric protection, not common ownership or management of the atmosphere. That narrow application of the term was in line with existing applications of the concept in international environmental law. It reflected the understanding that it was not a particular resource, but rather threats to that resource, that were of common concern, since States both contributed to the problem and shared in its effects. Mr. Murphy had argued that draft guideline 3 would apply to the kind of bilateral problem of transboundary air pollution exemplified by the *Trail Smelter* arbitration. However, the concept of the "common concern of humankind" would apply to such pollution only insofar as it was a global phenomenon; it would not cover transboundary air pollution affecting specific individual States.

15. Several members of the Commission had pointed out that the legal implications of the "common concern" concept were unclear, that the concept was unsettled and that the report had overstated the link between that concept and *erga omnes* obligations. While it was true that *erga omnes* obligations had been mentioned in the *Barcelona Traction* case only in *obiter dicta*, it was his understanding that Judge Lachs, thought to have been the author of that language, had been unable to fulfil his intention of developing the concept in future judgments. In his next report, the Special Rapporteur would explore the link between "common concern" and *erga omnes* obligations when discussing the general obligation to protect the atmosphere. The report would also consider *actio popularis*, which was related to the enforcement of *erga omnes* obligations arising out of the common concern for protection of the atmosphere.

16. Objections had been raised about a lack of clarity in the substantive content of any *erga omnes* obligations arising from the concept of "common concern of humankind". It had been argued that the concept had no specific normative content and that framing the protection of the atmosphere in terms of that concept was to put the cart before the horse, to propose a legal classification before defining the actual legal obligations of States. Such reasoning assumed that law-making could and should only occur through a bottom-up approach, applying legal principles that were already well defined and understood. However, any law-making exercise required the use of both inductive and deductive approaches. A better metaphor might therefore be the relationship of children to their parents: the notion of "common concern of humankind" might still be in its infancy, but it was the responsibility of the older generation to encourage its development for the future. It could and should be the Commission's task to explore the legal obligations of the notion and to articulate them as part of the draft guidelines.

17. Although the substantive legal obligations attaching to the concept of common concern were still being developed, that did not mean that the term was devoid of normative content entirely. Two speakers had indicated that the concept implied that States had a duty to cooperate to ensure protection of the atmosphere for future generations. The duty to cooperate would be discussed at length in future reports.

18. Now that the principle of *sic utere tuo ut alienum non laedas* had been recognized in the preamble to the United Nations Framework Convention on Climate Change and in article 2, paragraph 2 (*b*), of the Vienna Convention for the Protection of the Ozone Layer, it was no longer limited to the context of bilateral transboundary harm. It applied to international environmental law in general and could therefore be transposed to the sphere of atmospheric protection.

19. In questioning the substantive content of the notion of common concern, Mr. Murphy had mentioned three possible interpretations of that concept, articulated by Alan E. Boyle in the work referenced in the footnote to paragraph 12 of the first report.[148] His own understanding of

[145] See the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 146 *et seq.*, paras. 97–98. The articles on prevention of transboundary harm from hazardous activities are reproduced in the annex to General Assembly resolution 62/68 of 6 December 2007.

[146] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 152–153.

[147] *Ibid.*, p. 149 (draft article 1).

[148] P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment*, 3rd ed., Oxford University Press, 2009, pp. 335–378.

"common concern" was that it created substantive obligations of environmental protection, in addition to those already recognized by customary international law. He rejected the alternative interpretations whereby the "common concern" concept gave all States a legal interest, or standing, in the enforcement of rules concerning protection of the global atmosphere or created rights for individuals and future generations. Contrary to Mr. Murphy's fears, his intention in employing the concept was not to create a legal duty for industrialized States to provide financial assistance to developing nations, or to create a liability mechanism in environmental law, but rather to provide a framework for international cooperation towards atmospheric protection.

20. Mr. Park's criticism of the use of the concept in draft guideline 3 reflected a view of the atmosphere as being divided into one part that was subject to a State's sovereignty or control and another that was not. That view was problematic, however. It was based on an approach to the protection of the marine environment, enshrined in the United Nations Convention on the Law of the Sea, that was ill adapted to the current topic, as two speakers had observed. It would be impractical, if not impossible, for a State to exercise jurisdiction and control over a portion of the air that happened to be in its territorial airspace at a particular moment but later moved to another State's airspace. The concept of jurisdiction and control was premised on an assumption that the object of control was clearly identifiable. However, the atmosphere, unlike the sea, could not be visibly divided or delineated; it was for that reason that the first report treated it as a comprehensive single unit, not subject to division along State lines.

21. He endorsed Mr. Candioti's suggestion that the title of draft guideline 3 be changed to "Protection of the atmosphere as a common concern of humankind" and that the concept of common concern form the basis of both a stand-alone guideline and a guideline articulating the basic principles relevant to atmospheric protection. In addition, he intended to move the savings clause on airspace from draft guideline 2 to draft guideline 3.

22. Two speakers considered that the concept of "common heritage of humankind" was preferable to "common concern", since the latter notion might be too weak to provide an effective legal regime for the protection of the atmosphere. However, while the instruments adopted in 1954 and 1967 on celestial bodies and cultural property used the language of common heritage, the notion had acquired a new meaning over time: it was now understood as requiring a far-reaching institutional apparatus for the implementation of protective mechanisms. It was in part for that reason that the General Assembly had designated climate change as a "common concern of [hu]mankind",[149] instead of its common heritage. However, he would have no objection if the Commission chose to use the concept of "common heritage" in relation to atmospheric pollution.

23. In sum, 10 members had expressed support for sending all three draft guidelines to the Drafting Committee, while 4 members had been in favour of sending some and deferring consideration of others until the next session. Two members had indicated that they would not oppose sending the draft guidelines to the Drafting Committee, although they would prefer to postpone doing so until the next session. Four members had opposed referral to the Drafting Committee, preferring to leave the draft guidelines in abeyance until the next session. Three members had not expressed their views on referral. Thus, the majority of the members had supported continuing the discussion of at least some of the draft guidelines in the Drafting Committee. Nonetheless, he would like to reformulate some parts of the draft guidelines, in light of the comments, suggestions and criticisms raised, before referring them to the Drafting Committee.

24. In response to a question by Mr. NOLTE, he said that the revised draft guidelines would appear in his second report and that their referral to the Drafting Committee could be decided by the plenary following the debate on the topic.

25. The CHAIRPERSON said that she took it that the Commission wished to follow the recommendation of the Special Rapporteur and defer the referral of the draft guidelines to the Drafting Committee until the following year.

It was so decided.

The meeting rose at 11.15 a.m.

3215th MEETING

Thursday, 5 June 2014, at 10.05 a.m.

Chairperson: Ms. Concepción ESCOBAR HERNÁNDEZ (Vice-Chairperson)

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*concluded*)* (A/CN.4/666, Part II, sect. A, A/CN.4/671, A/CN.4/L.833)

[Agenda item 6]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. SABOIA (Chairperson of the Drafting Committee) presented the text and titles of draft conclusions 6 to 10, which had been provisionally adopted by the Drafting

[149] General Assembly resolution 43/53 on protection of global climate for present and future generations of mankind of 6 December 1988, para. 1.

* Resumed from the 3209th meeting.

Committee at the current session. The draft conclusions, as contained in A/CN.4/L.833, read:

Conclusion 6. Identification of subsequent agreements and subsequent practice

1. The identification of subsequent agreements and subsequent practice under article 31, paragraph 3, requires, in particular, a determination whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty. This is not normally the case if the parties have merely agreed not to apply the treaty temporarily or agreed to establish a practical arrangement (*modus vivendi*).

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, can take a variety of forms.

3. The identification of subsequent practice under article 32 requires, in particular, a determination whether conduct by one or more parties is in the application of the treaty.

Conclusion 7. Possible effects of subsequent agreements and subsequent practice in interpretation

1. Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.

2. Subsequent practice in the sense of article 32 can also contribute to the clarification of the meaning of a treaty.

3. It is presumed that the parties to a treaty, by an agreement subsequently arrived at or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the Vienna Convention on the Law of Treaties and under customary international law.

Conclusion 8. Weight of subsequent agreements and subsequent practice as a means of interpretation

1. The weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3, depends, *inter alia*, on its clarity and specificity.

2. The weight of subsequent practice under article 31, paragraph 3 (*b*), depends, in addition, on whether and how it is repeated.

3. The weight of subsequent practice as a supplementary means of interpretation under article 32 may depend on the criteria referred to in paragraphs 1 and 2.

Conclusion 9. Agreement of the parties regarding the interpretation of a treaty

1. An agreement under article 31, paragraph 3 (*a*) and (*b*), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Though it shall be taken into account, such an agreement need not be legally binding.

2. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (*b*), may vary. Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction.

Conclusion 10. Decisions adopted within the framework of a conference of States parties

1. A conference of States parties, under these draft conclusions, is a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, except if they act as members of an organ of an international organization.

2. The legal effect of a decision adopted within the framework of a conference of States parties depends primarily on the treaty and any applicable rules of procedure. Depending on the circumstances, such a decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (*a*), or give rise to subsequent practice under article 31, paragraph 3 (*b*), or to subsequent practice under article 32. Decisions adopted within the framework of a conference of States parties often provide a non-exclusive range of practical options for implementing the treaty.

3. A decision adopted within the framework of a conference of States parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, insofar as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including by consensus.

2. Only five draft conclusions had been presented, since draft conclusion 11, as proposed by the Special Rapporteur, had been partially incorporated into draft conclusion 7. Draft conclusion 6 was not overly prescriptive and should be regarded as a practice pointer to assist the interpreter. Paragraph 1 was a reminder that, for identification purposes, particular attention should be paid to determining whether the parties, by an agreement or a practice, had assumed a position regarding the interpretation of a treaty; if their conduct had been motivated by other considerations, the subsequent agreement or subsequent practice was irrelevant. Subsequent agreements and subsequent practice therefore had the effects attributed to them under article 31, paragraph 3, of the 1969 Vienna Convention only if they concerned the interpretation of a treaty. The commentary would specify that the term "agreement" denoted agreements between the parties regarding the interpretation of a treaty or the application of its provisions and that the term "practice" meant any subsequent practice in the application of the treaty. It would also state that the application of a treaty or its provisions could serve not only to reflect its interpretation, but also to illustrate whether and to what extent the interpretation of the parties was based on practice. The second sentence of paragraph 1, which was a slightly modified version of paragraph 3 of the original draft conclusion 9,[150] had been added in order to clarify the principle set forth in the first sentence by distinguishing between subsequent conduct that was relevant to article 31, paragraph 3, and that which was not. The commentary would explain that the sentence was intended to be illustrative, not exhaustive. Paragraph 2 referred to the "form" of subsequent agreements and subsequent practice, an issue which had been covered by the original draft conclusions 8 and 9,[151] but it did not deal with that of their "value" or "weight". The purpose of that paragraph was to make it clear that the interpretation of treaties under the 1969 Vienna Convention must encompass various forms of subsequent agreements and subsequent practice. The Drafting Committee had added paragraph 3 in response to the concerns of members who wished to address the identification of subsequent practice under articles 31 and 32 separately in order to avoid blurring the distinction between the two articles. The Committee had deemed it important not to give the impression that the subsequent practice of only one or some of the parties was comparable, for the purposes of treaty interpretation, to subsequent agreements or subsequent practice under article 31, paragraph 3.

[150] See A/CN.4/671, annex.

[151] *Idem*.

3. With regard to draft conclusion 7, in light of the debates in plenary meetings, the Drafting Committee had been in favour of the Special Rapporteur's proposal to examine the issue of value in a separate draft conclusion. Paragraph 1 emphasized that subsequent agreements and subsequent practice were just some of the means contributing to treaty interpretation, which constituted a single, complex operation, and that consideration should therefore be given to their interaction with other means of interpretation. It followed that subsequent conduct could help to clarify not only the terms of a treaty but also the other means of interpretation mentioned in article 31. Paragraph 3 was based on paragraph 2 of the original draft conclusion 11,[152] which had related to the scope for interpretation by subsequent agreements and subsequent practice. The fact that paragraph 1 of the original draft conclusion 11 had been rendered redundant by draft conclusion 7 had raised the question as to whether paragraph 2 should be moved within the same provision or should constitute a new provision. The former option had been chosen, and a third paragraph had been added in order to remind the interpreter that the intention of the parties, as reflected in their subsequent conduct under article 31, was presumed to be solely the interpretation of the treaty and that if subsequent agreements served to amend or modify a treaty they fell under article 39 and should be distinguished from subsequent agreements under article 31, paragraph 3. The second sentence, which reinforced that presumption, adopted the wording used by the Study Group on treaties over time. Although its deletion had been proposed on the grounds that it either went too far, or not far enough, the Drafting Committee had considered that the last sentence, which contained a "without prejudice" clause, sufficiently clarified paragraph 3 as a whole.

4. The original draft conclusion 8[153] had been recast in light of the views expressed in plenary meetings, above all in order to distinguish between the possible *effects* of subsequent agreements and subsequent practice in the interpretation of the treaty, referred to in draft conclusion 7, and the *weight* that should be given to them in that process, on the understanding that such weight should be assessed in relation to other means of interpretation. The new wording, which combined the original draft conclusion 8 and paragraph 2 of the original draft conclusion 7, sought to enlighten the interpreter as to the circumstances in which subsequent agreements and subsequent practice carried more or less weight as means of interpretation. The criterion of "concordant, common and consistent" practice initially proposed by the Special Rapporteur had not been retained, since some members had thought that it was insufficiently established or overly prescriptive. In paragraph 1, the words *inter alia* showed that the provision was not exhaustive; the term "specificity" should be understood as describing the extent to which subsequent agreements and subsequent practice related to a treaty. Paragraph 2 introduced the criteria of repetition and frequency, to demonstrate that the mere repetition of a practice was not necessarily sufficient to endow it with interpretative value under article 31, paragraph 3 (*b*). The Drafting Committee had decided to deal with article 32 in a separate paragraph to distinguish it from article 31. The phrase "as a supplementary means of interpretation" was used to emphasize the subsidiary nature of subsequent practice under article 32, and the verb "may" indicated that the criteria mentioned in paragraphs 1 and 2 were not necessarily as relevant in that context as they were for assessing the weight of subsequent practice under article 31, paragraph 3 (*b*), since other factors could be taken into account. The distinction between subsequent practice under article 31 and that under article 32, as well as the weight to be given to it in each case for the purposes of interpretation, would be clarified in the commentary.

5. Draft conclusion 9 had been reworked in order to remove any reference to the form of the agreement, or to cases in which subsequent practice or subsequent agreement between parties did not signify a common understanding regarding the interpretation of a treaty. As stated earlier, both points were currently addressed in draft conclusion 6. The first paragraph of the new text highlighted the common feature of article 31, paragraph 3 (*a*) and (*b*), namely the requirement in both cases of a common understanding between parties regarding the interpretation of a treaty. Furthermore, not only must the parties be aware of that common understanding, but the latter must reflect their acceptance of the resulting interpretation. The aim of the second sentence of the same paragraph was to make it clear that the term "agreement" under article 31, paragraph 3, must not be seen as a requirement that the parties should assume or establish legal obligations beyond, or independent of, the treaty in question. In other words, the conduct of the parties for the purposes of interpreting the treaty would be taken into account, insofar as that conduct attributed a certain meaning to the treaty and therefore established an agreement regarding its interpretation, but that agreement did not have to be legally binding. That wording disregarded the issue of the politically binding nature which some agreements might have. The conditions for taking silence into consideration, referred to in paragraph 2, would be specified in the commentary.

6. Draft conclusion 10 recognized the fact that, depending on the circumstances, decisions at a conference of States parties might not automatically give rise to subsequent agreements or subsequent practice under article 31, paragraph 3, and article 32. It also recognized the importance, in assessing the subsequent agreement and subsequent practice, of any rules of procedure that might govern conferences. The word "any" had been added to emphasize the fact that a conference of parties might not necessarily have rules of procedure. The aim of the final additional sentence in paragraph 2 was to remind the interpreter that the decisions of conferences of States parties often offered practical solutions for the purposes of applying a treaty, which did not necessarily give rise to a subsequent agreement or subsequent practice for the purposes of interpreting that treaty. Lastly, the intention behind the last phrase, "including by consensus", was to dispel the notion that the adoption of a decision by consensus necessarily presupposed the existence of an agreement in substance. The commentary would specify the implications of a consensus and the problems it could generate in the interpretation of treaties.

[152] *Idem*.

[153] *Idem*.

7. The CHAIRPERSON invited the members of the Commission to adopt, one by one, the draft conclusions provisionally adopted by the Drafting Committee, as contained in document A/CN.4/L.833.

Draft conclusion 6. Identification of subsequent agreements and subsequent practice

Draft conclusion 6 was adopted.

Draft conclusion 7. Possible effects of subsequent agreements and subsequent practice in interpretation

Draft conclusion 7 was adopted.

Draft conclusion 8. Weight of subsequent agreements and subsequent practice as a means of interpretation

Draft conclusion 8 was adopted.

Draft conclusion 9. Agreement of the parties regarding the interpretation of a treaty

8. Mr. KAMTO said that, in his view, the rule whereby an agreement under article 31, paragraph 3 (*a*) and (*b*), was not necessarily legally binding was insufficiently substantiated. In addition, several provisions of the 1969 Vienna Convention were devoted to consent and could be applied to all agreements concluded thereunder. Moreover, if certain agreements specified that they were binding, should it be inferred *a contrario* that agreements which were silent on that matter were not binding? Lastly, since interpretation gave rise to a certain degree of modification of a treaty in one way or another, it was difficult to accept that a State which had been party to a non-binding agreement could then oppose that agreement.

9. Mr. FORTEAU also reiterated his reservations relating to the scope of that rule and said that an agreement under article 31, paragraph 3, was inevitably binding. Moreover, paragraphs 1 and 2 of draft conclusion 9 related to acceptance by the parties, which seemed to reflect the requirement that any agreement had to be based on consent. The commentary to draft conclusion 4 (Definition of subsequent agreement and subsequent practice)[154] did not truly substantiate the said rule. The commentary to draft conclusion 9 should also be more convincing in that regard.

10. Mr. NOLTE (Special Rapporteur) said that, in the Drafting Committee, he had been willing to adopt the proposal made by Mr. Hmoud, which would have enabled the Commission to transcend the debate by stating that an agreement under article 31, paragraph 3, "produced legal effects" and that "to that extent it was binding". Furthermore, he had cited various sources in support of the possibility that such agreements might not be binding. Following a lengthy discussion, the Drafting Committee had eventually adopted the current wording, which Mr. Kamto and Mr. Forteau might accept until the commentary had convinced them of its pertinence.

11. Mr. KAMTO was not sure that such a substantive issue could be settled in the commentary. Furthermore, the examples that could be found of non-binding decisions or "gentlemen's agreements" which did have a legally binding effect had to do with their frequency or the sameness of their content, which did not render them "agreements" in the strict sense of the word. The problem likely stemmed from the use of the term "agreement" when referring to arrangements that did not fall under that category. However, he would await the clarifications provided by the Special Rapporteur in the commentary.

Draft conclusion 9 was adopted, subject to an editorial amendment in the French text of paragraph 1.

Draft conclusion 10. Decisions adopted within the framework of a conference of States parties

12. The CHAIRPERSON, speaking as a member, said that she approved of the replacement of *sustancial* by *sustantivo* in the Spanish text of paragraph 3, which rendered moot the debate surrounding that term at a previous meeting.

Draft conclusion 10 was adopted.

The report of the Drafting Committee on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as a whole, as it appeared in document A/CN.4/L.833, was adopted.

The meeting rose at 11.05 a.m.

3216th MEETING

Friday, 6 June 2014, at 10 a.m.

Chairperson: Mr. Shinya MURASE (Vice-Chairperson)

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murphy, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti.

Expulsion of aliens (*concluded*)* (A/CN.4/669 and Add.1, A/CN.4/670, A/CN.4/L.832)

[Agenda item 2]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. SABOIA (Chairperson of the Drafting Committee) introduced the titles and texts of the draft articles on the expulsion of aliens, as adopted by the Drafting Committee, and as contained in document A/CN.4/L.832, which read:

[154] *Yearbook … 2013*, vol. II (Part Two), pp. 28–34.

* Resumed from the 3204th meeting.

EXPULSION OF ALIENS

Part One

GENERAL PROVISIONS

Article 1. Scope

1. The present draft articles apply to the expulsion by a State of aliens present in its territory.

2. The present draft articles do not apply to aliens enjoying privileges and immunities under international law.

Article 2. Use of terms

For the purposes of the present draft articles:

(*a*) "expulsion" means a formal act or conduct attributable to a State, by which an alien is compelled to leave the territory of that State; it does not include extradition to another State, surrender to an international criminal court or tribunal, or the non-admission of an alien to a State;

(*b*) "alien" means an individual who does not have the nationality of the State in whose territory that individual is present.

Article 3. Right of expulsion

A State has the right to expel an alien from its territory. Expulsion shall be in accordance with the present draft articles, without prejudice to other applicable rules of international law, in particular those relating to human rights.

Article 4. Requirement for conformity with law

An alien may be expelled only in pursuance of a decision reached in accordance with law.

Article 5. Grounds for expulsion

1. Any expulsion decision shall state the ground on which it is based.

2. A State may only expel an alien on a ground that is provided for by law.

3. The ground for expulsion shall be assessed in good faith and reasonably, in the light of all the circumstances, taking into account in particular, where relevant, the gravity of the facts, the conduct of the alien in question or the current nature of the threat to which the facts give rise.

4. A State shall not expel an alien on a ground that is contrary to its obligations under international law.

Part Two

CASES OF PROHIBITED EXPULSION

Article 6. Rules relating to the expulsion of refugees

The present draft articles are without prejudice to the rules of international law relating to refugees, as well as to any more favourable rules or practice on refugee protection, and in particular to the following rules:

(*a*) a State shall not expel a refugee lawfully in its territory save on grounds of national security or public order;

(*b*) a State shall not expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where the person's life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, unless there are reasonable grounds for regarding the person as a danger to the security of the country in which he or she is, or if the person, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Article 7. Rules relating to the expulsion of stateless persons

The present draft articles are without prejudice to the rules of international law relating to stateless persons, and in particular to the rule that a State shall not expel a stateless person lawfully in its territory save on grounds of national security or public order.

Article 8 [9]. Deprivation of nationality for the purpose of expulsion

A State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her.

Article 9 [10]. Prohibition of collective expulsion

1. For the purposes of the present draft article, "collective expulsion" means expulsion of aliens, as a group.

2. The collective expulsion of aliens is prohibited.

3. A State may expel concomitantly the members of a group of aliens, provided that the expulsion takes place after and on the basis of an assessment of the particular case of each individual member of the group in accordance with the present draft articles.

4. The present draft article is without prejudice to the rules of international law applicable to the expulsion of aliens in the event of an armed conflict involving the expelling State.

Article 10 [11]. Prohibition of disguised expulsion

1. Any form of disguised expulsion of an alien is prohibited.

2. For the purposes of the present draft article, "disguised expulsion" means the forcible departure of an alien from a State resulting indirectly from an action or an omission attributable to the State, including where the State supports or tolerates acts committed by its nationals or other persons, intended to provoke the departure of aliens from its territory other than in accordance with law.

Article 11 [12]. Prohibition of expulsion for the purpose of confiscation of assets

The expulsion of an alien for the purpose of confiscating his or her assets is prohibited.

Article 12 [13]. Prohibition of resort to expulsion in order to circumvent an ongoing extradition procedure

A State shall not resort to the expulsion of an alien in order to circumvent an ongoing extradition procedure.

Part Three

PROTECTION OF THE RIGHTS OF ALIENS SUBJECT TO EXPULSION

Chapter I

GENERAL PROVISIONS

Article 13 [14]. Obligation to respect the human dignity and human rights of aliens subject to expulsion

1. All aliens subject to expulsion shall be treated with humanity and with respect for the inherent dignity of the human person at all stages of the expulsion process.

2. They are entitled to respect for their human rights, including those set out in the present draft articles.

Article 14 [15]. Prohibition of discrimination

The expelling State shall respect the rights of the alien subject to expulsion without discrimination of any kind on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.

Article 15 [16]. Vulnerable persons

1. Children, older persons, persons with disabilities, pregnant women and other vulnerable persons who are subject to expulsion shall be considered as such and treated and protected with due regard for their vulnerabilities.

2. In particular, in all actions concerning children who are subject to expulsion, the best interests of the child shall be a primary consideration.

Chapter II

PROTECTION REQUIRED IN THE EXPELLING STATE

Article 16 [17]. Obligation to protect the right to life of an alien subject to expulsion

The expelling State shall protect the right to life of an alien subject to expulsion.

Article 17 [18]. Prohibition of torture or cruel, inhuman or degrading treatment or punishment

The expelling State shall not subject an alien subject to expulsion to torture or to cruel, inhuman or degrading treatment or punishment.

Article 18 [20]. Obligation to respect the right to family life

The expelling State shall respect the right to family life of an alien subject to expulsion. It shall not interfere arbitrarily or unlawfully with the exercise of such right.

Article 19. Detention of an alien for the purpose of expulsion

1. (*a*) The detention of an alien for the purpose of expulsion shall not be arbitrary nor punitive in nature.

(*b*) An alien detained for the purpose of expulsion shall, save in exceptional circumstances, be separated from persons sentenced to penalties involving deprivation of liberty.

2. (*a*) The duration of the detention shall be limited to such period of time as is reasonably necessary for the expulsion to be carried out. All detention of excessive duration is prohibited.

(*b*) The extension of the duration of the detention may be decided upon only by a court or, subject to judicial review, by another competent authority.

3. (*a*) The detention of an alien subject to expulsion shall be reviewed at regular intervals on the basis of specific criteria established by law.

(*b*) Subject to paragraph 2, detention for the purpose of expulsion shall end when the expulsion cannot be carried out, except where the reasons are attributable to the alien concerned.

Article 20 [30]. Protection of the property of an alien subject to expulsion

The expelling State shall take appropriate measures to protect the property of an alien subject to expulsion, and shall, in accordance with the law, allow the alien to dispose freely of his or her property, even from abroad.

Chapter III

PROTECTION IN RELATION TO THE STATE OF DESTINATION

Article 21. Departure to the State of destination

1. The expelling State shall take appropriate measures to facilitate the voluntary departure of an alien subject to expulsion.

2. In cases of forcible implementation of an expulsion decision, the expelling State shall take the necessary measures to ensure, as far as possible, the safe transportation to the State of destination of the alien subject to expulsion, in accordance with the rules of international law.

3. The expelling State shall give the alien subject to expulsion a reasonable period of time to prepare for his or her departure, having regard to all circumstances.

Article 22. State of destination of aliens subject to expulsion

1. An alien subject to expulsion shall be expelled to his or her State of nationality or any other State that has the obligation to receive the alien under international law, or to any State willing to accept him or her at the request of the expelling State or, where appropriate, of the alien in question.

2. Where the State of nationality or any other State that has the obligation to receive the alien under international law has not been identified and no other State is willing to accept the alien, that alien may be expelled to any State where he or she has a right of entry or stay or, where applicable, to the State from where he or she has entered the expelling State.

Article 23. Obligation not to expel an alien to a State where his or her life would be threatened

1. No alien shall be expelled to a State where his or her life would be threatened on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.

2. A State that does not have the death penalty shall not expel an alien to a State where the alien has been sentenced to the death penalty or where there is a real risk that he or she will be sentenced to death, unless it has previously obtained an assurance that the death penalty will not be imposed or, if already imposed, will not be carried out.

Article 24. Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment

A State shall not expel an alien to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Chapter IV

PROTECTION IN THE TRANSIT STATE

Article 25. Protection in a transit State of the human rights of an alien subject to expulsion

A transit State shall protect the human rights of an alien subject to expulsion, in conformity with its obligations under international law.

Part Four

SPECIFIC PROCEDURAL RULES

Article 26. Procedural rights of aliens subject to expulsion

1. An alien subject to expulsion enjoys the following procedural rights:

(*a*) the right to receive notice of the expulsion decision;

(*b*) the right to challenge the expulsion decision, except where compelling reasons of national security otherwise require;

(*c*) the right to be heard by a competent authority;

(*d*) the right of access to effective remedies to challenge the expulsion decision;

(*e*) the right to be represented before the competent authority; and

(*f*) the right to have the free assistance of an interpreter if he or she cannot understand or speak the language used by the competent authority.

2. The rights listed in paragraph 1 are without prejudice to other procedural rights or guarantees provided by law.

3. An alien subject to expulsion has the right to seek consular assistance. The expelling State shall not impede the exercise of this right or the provision of consular assistance.

4. The procedural rights provided for in this article are without prejudice to the application of any legislation of the expelling State concerning the expulsion of aliens who have been unlawfully present in its territory for a brief duration.

Article 27. Suspensive effect of an appeal against an expulsion decision

An appeal lodged by an alien subject to expulsion who is lawfully present in the territory of the expelling State shall have a suspensive effect on the expulsion decision when there is a real risk of serious irreversible harm.

Article 28. International procedures for individual recourse

An alien subject to expulsion shall have access to any available procedure involving individual recourse to a competent international body.

PART FIVE

LEGAL CONSEQUENCES OF EXPULSION

Article 29. Readmission to the expelling State

1. An alien lawfully present in the territory of a State, who is expelled by that State, shall have the right to be readmitted to the expelling State if it is established by a competent authority that the expulsion was unlawful, save where his or her return constitutes a threat to national security or public order, or where the alien otherwise no longer fulfils the conditions for admission under the law of the expelling State.

2. In no case may the earlier unlawful expulsion decision be used to prevent the alien from being readmitted.

Article 30 [31]. Responsibility of States in cases of unlawful expulsion

The expulsion of an alien in violation of the expelling State's obligations set forth in the present draft articles or in any other rule of international law entails the international responsibility of that State.

Article 31 [32]. Diplomatic protection

The State of nationality of an alien subject to expulsion may exercise diplomatic protection with respect to the alien in question.

2. The Drafting Committee had held 11 meetings, from 14 to 27 May 2014. It had completed its work on the 31 draft articles and had decided to report to the plenary Commission with the recommendation that they be adopted on second reading.

3. It was a historic day for the Commission: the treatment of aliens had been one of the 14 original topics selected for consideration in 1949,[155] and the item on expulsion of aliens had been on the agenda since 2004.[156]

4. The draft articles were based on the premise that every State had the right to expel aliens, subject to general limitations, as well as specific substantive and procedural requirements. The limitations had been clarified in the arbitral practice before the Second World War, although contemporary human rights law had also had a significant impact on the law relating to the expulsion of aliens. On behalf of the Drafting Committee, he commended the Special Rapporteur, whose mastery of the subject and efficiency had greatly facilitated the Committee's task. Thanks were also due to the Committee members and to the Secretariat.

5. Draft article 1 pertained to the scope of the draft articles. Paragraph 1 had been adopted as formulated on first reading,[157] with the exception of the words "lawfully or unlawfully", which had been deleted for the sake of clarity and to address the concerns of some Governments. That amendment, as explained in the commentary to the draft article, did not imply any modification as to the scope *ratione personae* of the draft articles, which applied to aliens irrespective of whether their presence in the territory of a State was lawful or unlawful.[158] The amendment was intended to make it clear that every provision of the draft articles did not apply generally to both categories of aliens, however: some provisions distinguished between those two categories, particularly with respect to the rights to which such persons were entitled. In addition, in the French text of paragraph 1, the words *des étrangers* had been replaced with *d'un étranger*, in order to avoid any discrepancy with draft article 10, which prohibited collective expulsion.

6. Draft article 2 was the traditional provision on use of terms. The discussion had focused on whether to add an element of intentionality in the definitions, as suggested by some Governments, and on coherence with the articles on responsibility of States for internationally wrongful acts.[159] The question of the discrepancy between the general definition of expulsion contained in draft article 2 and in other draft articles had also arisen. To meet those concerns, the definition in draft article 2 (*a*) had been refined and the words "other than a refugee" had been deleted due to the formulation of draft article 6 as a "without prejudice" clause.

7. Draft article 3, on the right of expulsion, was the core provision within the text, balancing the uncontested right of a State to expel an alien with the limitations on that right under international law. Some concerns had been raised about the second sentence, which seemed to imply that the entire set of draft articles reflected applicable rules of international law. The Drafting Committee had accordingly reformulated that sentence along the lines of a "without prejudice" clause.

8. In draft article 5, paragraph 2, it had been decided to delete the explicit reference to the grounds of national security and public order. Although those grounds were the only ones provided for under international instruments, they had been seen as involving exceptional circumstances which it would be better to refer to in the commentary. A similar concern had been expressed regarding paragraph 3, which had been amended along the lines of paragraph 2. Paragraph 4 had been amended to show that a State should not expel an alien on a ground that was contrary to "its obligations under" international law,

[155] *Yearbook … 1949*, Report to the General Assembly, pp. 277 *et seq*., at p. 281, para. 16.

[156] See *Yearbook … 2004*, vol. II (Part Two), pp. 13–14, para. 19.

[157] *Yearbook … 2012*, vol. II (Part Two), pp. 15 *et seq*., para. 45.

[158] *Ibid*., pp. 18–19, para. 46, commentary to draft article 1.

[159] General Assembly resolution 56/83 of 12 December 2001, annex. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq*., paras. 76–77.

rather than simply "international law". The new formulation would also harmonize the language of draft article 5 with that of draft article 25.

9. In Part Two, on cases of prohibited expulsion, it had been suggested by some Governments, as well as in the plenary debate, that all references to refugees be deleted from draft article 6, since the international law regime relating to refugees was extremely complex and the draft articles might not always be consistent with it. The Drafting Committee had considered that refugees were an important category of aliens, who should have a place in the draft articles. In order to address possible discrepancies with the international law and practice on refugees, on the one hand, and to emphasize the special protection against expulsion that refugees enjoyed under international law, on the other, the Committee had decided to adopt a new draft article 6 composed of two parts. The first part of the new article stated, in general terms, that the draft articles were without prejudice to the rules of international law relating to refugees and to any more favourable rules or practice on refugee protection. The commentary would refer in more detail to existing rules that in some cases were more favourable than those set out in the draft articles, but in view of its importance for refugee protection, the Drafting Committee had decided to refer to practice in the text of draft article 6.

10. The second part of draft article 6 was composed of two subparagraphs, which highlighted the specific rules on the international law of refugees of particular importance for the topic. The text of the former draft article 6, paragraph 1, was reproduced in subparagraph (*a*), and that of the former draft article 6, paragraph 3, in subparagraph (*b*). The text of subparagraph (*b*) had been refined to reflect exactly the language of the Convention relating to the Status of Refugees. The text of the former draft article 6, paragraph 2, pertaining to the question of refugees unlawfully present in the territory of a State who had applied for recognition of refugee status,[160] had been deleted: the Drafting Committee had considered it more appropriate to address that question, which was still in the domain of *lex ferenda*, in the commentary. In light of the substantial changes made to draft article 6, its title had been amended to read "Rules relating to the expulsion of refugees".

11. When examining draft article 7, relating to the question of stateless persons, the Drafting Committee had decided to reformulate the first part as a "without prejudice" clause, in order to avoid possible discrepancies between the draft articles and the existing regime on stateless persons. The second part of draft article 7 elucidated the specific rule prohibiting the expulsion, save on grounds of national security or public order, of a stateless person who was lawfully in the territory of a State. The title had been amended to read "Rules relating to the expulsion of stateless persons".

12. Former draft article 8[161]—a "without prejudice" clause designed to ensure the application of rules concerning the expulsion of refugees and stateless persons provided for by law, but not mentioned in draft articles 6 and 7—had become redundant in light of the amendments to draft articles 6 and 7, and had therefore been deleted.

13. For reasons of style, the word "sole" had been deleted from the title of what was now draft article 8 relating to deprivation of nationality for the purpose of expulsion.

14. In draft article 9, two editorial corrections had been made to the definition of collective expulsion in paragraph 1. Paragraph 2, as adopted on first reading, had referred expressly to the prohibition of the collective expulsion of migrant workers and members of their families.[162] The Drafting Committee had considered it preferable not to mention that category of aliens. The new text, which set out more directly the principle of the prohibition of collective expulsion, was more in line with the texts of the relevant regional instruments. The amendment did not mean, however, that the specific prohibition of the collective expulsion of migrant workers and members of their families had been excluded from the scope of the draft article; that aspect would be elaborated on in the commentary.

15. Paragraph 3 specified the conditions under which the members of a group of aliens might be expelled concomitantly, without such a measure being regarded as collective expulsion within the meaning of the draft articles. The original text of paragraph 3 had specified a reasonable and objective examination of the particular case of each individual member of the group as a basis for expulsion. Since that criterion might introduce a discrepancy with the other draft articles dealing with the review of a decision on expulsion by national authorities, however, it had been decided to remove the reference to the criterion and to refer in more general terms to "an assessment of the particular case of each individual member of the group in accordance with the present draft articles".

16. In draft article 10, the definition of disguised expulsion contained in paragraph 2 had been refined with a view to presenting more clearly the main elements, namely that an alien had been forced to leave the territory of a State as the intentional result of an action or omission attributable to the State. The definition also shed light on the specific case when the expulsion was the result of unlawful acts committed by the nationals of the State or other persons, and it stated explicitly that the prohibition covered only actions and omissions intended to provoke the departure of an alien in any way other than in accordance with law.

17. Some minor editorial amendments had been made to draft article 12: the word "ongoing" had been added to the title, to align it with the text, and in the text, the words "of an alien" had been added after the word "expulsion". It had been suggested that it would be useful to refer in the commentary to the Commission's work on the responsibility of international organizations,[163] in order to explain the use of the term "circumvent" in draft article 12.

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[160] *Yearbook … 2012*, vol. II (Part Two), p. 16 (draft article 6).

[161] *Ibid*. (draft article 8).

[162] *Ibid*. (draft article 10).

[163] See the draft articles on the responsibility of international organizations adopted by the Commission at its sixty-third session and the commentaries thereto in *Yearbook … 2011*, vol. II (Part Two), pp. 40 *et seq*., paras. 87–88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

18. With regard to draft article 14, contained in Part Three on protection of the rights of aliens subject to expulsion, some Governments had expressed concern about the very general prohibition against discrimination set out in paragraph 1 of the draft article adopted on first reading.[164] According to the case law of international courts and tribunals on which the draft article was based, the expelling State was entitled to establish different rules for different categories of people, but it had the obligation to respect the rights of the alien subject to expulsion without discrimination of any kind. The Drafting Committee had decided to recast draft article 14 as a single paragraph in order to encapsulate that rule more directly. The title of the draft article had been amended to read "Prohibition of discrimination".

19. Draft article 18, paragraph 2, of the original text, which had recognized that the right to family life might be subject to limitations, had not received the full support of Governments. Acknowledging that the text adopted in 2012 was too close to the text of the European Convention on Human Rights (art. 8), the Drafting Committee had considered it more appropriate to merge paragraphs 1 and 2 and to redraft the text using the terms of article 17 of the International Covenant on Civil and Political Rights, which were also used in the regional human rights instruments. Draft article 18 now stated that the expelling State should not interfere arbitrarily or unlawfully with the exercise of the right to family life.

20. Draft article 19 set out the specific rules relating to the detention of an alien for the purpose of expulsion. Paragraph 1 (*a*) had been refined in order to clarify the principle that the detention of an alien subject to expulsion must not be punitive when such detention was for the purpose of expulsion, and not for other purposes. The prohibition in paragraph 1 (*a*) had also needed to be supplemented in order to cover not only punitive but also arbitrary detention of an alien for the purpose of expulsion. In view of the fact that the obligation set out in paragraph 1 (*b*) might be understood by States as a general obligation to detain all aliens subject to expulsion separately from other detainees, the wording had been amended in order to indicate explicitly that the obligation of separate detention applied solely to persons detained for the purpose of expulsion.

21. The wording of the first sentence of paragraph 2 (*a*) was so general as to make that sentence redundant; it had therefore been deleted. Paragraph 2 (*b*) had been amended in order to reflect better the principle that a decision to extend the duration of detention could be taken only by a court or by another authority subject to judicial review. The new formulation, which addressed concerns expressed by several States where such a decision could also be taken by an administrative authority, confirmed the principle recognized in international jurisprudence that, in such cases, the extension decision had to be reviewable.

22. Paragraph 3 (*b*) had been amended in order to take account of concerns expressed by Governments about its excessively broad scope. It now established clearly that, if expulsion could not be carried out, the detention must be ended, but only where such detention was for the purpose of expulsion, and not for any other reason.

23. The title of draft article 19 had been amended to read "Detention of an alien for the purpose of expulsion".

24. The text of draft article 20 had been transposed from Part Five, on the legal consequences of expulsion, to the end of chapter II, on protection required in the expelling State. The text and title of draft article 20 had been adopted without amendment.

25. In chapter III, entitled "Protection in relation to the State of destination", the prohibition set out in draft article 23, paragraph 1, had been the source of concerns expressed by Governments about any extension of the scope of the Convention relating to the Status of Refugees to cover situations in which not only the life but also the freedom of an alien was threatened. The Drafting Committee had accordingly decided not to engage in the development of international law in that area, and the reference to "freedom" had been deleted both from the title of the draft article and from paragraph 1. Paragraph 2 had been reworded to bring it into line with the standard set by the relevant case law and now indicated that an expelling State that did not have the death penalty must not expel an alien to a State where he or she had been sentenced to the death penalty or where there was a real risk that he or she would be sentenced to death. The title of draft article 23, as amended, read "Obligation not to expel an alien to a State where his or her life would be threatened".

26. Draft article 24 required the expelling State not to expel an alien to a State where he or she might be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Concerns had been expressed about the extension of the prohibition contained in article 3 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, which referred exclusively to torture, and not to cruel, inhuman or degrading treatment. However, in view of the concurring views on that matter of several universal and regional judicial bodies, the Drafting Committee had considered it preferable not to amend the draft article, on the understanding that the restrictive approach of the Convention and its corresponding treaty body would be properly reflected in the commentary.

27. In chapter IV, "Protection in the transit State", draft article 25 had been adopted with a minor editorial amendment.

28. Part Four of the draft articles set out the specific procedural rules applicable in the context of the expulsion of an alien.

29. Draft article 26, paragraph 1 (*b*), concerned the right to challenge an expulsion decision. However, article 13 of the International Covenant on Civil and Political Rights provided for an exception to that right, where compelling reasons of national security otherwise required. For the sake of consistency with the Covenant, the Drafting Committee had therefore included a similar limitation in the new wording of paragraph 1 (*b*).

[164] *Yearbook … 2012*, vol. II (Part Two), p. 16 (draft article 15).

30. Paragraph 4 took the form of a "without prejudice" clause with reference to the legislation of an expelling State concerning the expulsion of aliens who had been unlawfully present in its territory for a period of less than six months. That rule, in particular the six-month threshold, was an exercise in progressive development. It had been suggested that such a threshold could appear arbitrary and that the rule could face difficulties of implementation when the precise length of time an alien had been unlawfully present in the territory of a State had not been clearly established. The Drafting Committee had therefore considered it appropriate to replace the six-month threshold with a more flexible formulation, "a brief duration".

31. Given the many comments from Governments that disagreed with the broad scope of draft article 27,[165] which constituted progressive development of international law, the text had been amended to indicate that an appeal by an alien had suspensive effect on an expulsion decision not in all cases, but exclusively when there was a real risk of serious irreversible harm.

32. The purpose of draft article 28 was to make it clear that aliens subject to expulsion might, in some cases, be entitled to individual recourse to a competent international body. Its title had been modified to avoid giving the misleading impression that the draft article concerned domestic procedures, and it now read "International procedures for individual recourse".

33. In Part Five, on the legal consequences of expulsion, the wording of draft article 30 had been refined to refer to the international responsibility entailed by the violation, by the expelling State, of its obligations "set forth in" the draft articles, rather than "under" the draft articles.

34. In conclusion, he expressed the hope that the plenary Commission would be in a position to adopt the draft articles on the expulsion of aliens, as contained in document A/CN.4/L.832.

35. The CHAIRPERSON invited the Commission to adopt the titles and texts of the draft articles on the expulsion of aliens, as contained in document A/CN.4/L.832, on second reading.

Draft articles 1 to 31 were adopted, subject to minor editorial amendments to the French text of draft article 19.

36. The CHAIRPERSON said that it was his understanding that the Special Rapporteur would prepare commentaries on the draft articles for inclusion in the Commission's report to the General Assembly on the work of its sixty-sixth session.

Organization of the work of the session (*continued*)[*]

[Agenda item 1]

37. After the customary exchange of courtesies, the CHAIRPERSON declared the first part of the sixty-sixth session closed.

The meeting rose at 11.20 a.m.

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[165] See A/CN.4/669 and Add.1.

[*] Resumed from the 3210th meeting.

SUMMARY RECORDS OF THE SECOND PART OF THE SIXTY-SIXTH SESSION

Held at Geneva from 7 July to 8 August 2014

3217th MEETING

Monday, 7 July 2014, at 3.05 p.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction[166] (A/CN.4/666, Part II, sect. B, A/CN.4/673,[167] A/CN.4/L.850[168])

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited the Special Rapporteur to present her third report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/673).

2. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that her third report, which was devoted to the concept of "official", fitted into the workplan that had been followed since 2012. The report had been drafted in accordance with the working method proposed in her preliminary report,[169] which consisted in dealing separately with each of the various issues raised by the topic. As the report under consideration formed the first part of the study of immunity *ratione materiae,* which would be completed in the following report, it contained a section that identified the essential characteristics of that immunity and the normative criteria for defining it. There were three such criteria, but only the subjective element of immunity, in other words the notion of "official", was discussed in the third report. The notion of "official" was of special relevance to immunity *ratione materiae*, in that it clarified the personal scope thereof, but it was likewise of relevance to immunity *ratione personae*. A comprehensive analysis was therefore needed in order to provide a definition of the notion that was valid for both categories of immunity. She had adopted that approach owing to the limitation on the number of pages in special rapporteurs' reports and because the notion of "official" called for separate and exclusive treatment. Moreover, that term was scarcely addressed in the Secretariat memorandum on immunity of State officials from foreign criminal jurisdiction,[170] and several States in the Sixth Committee had highlighted the need for a clear definition.

3. The notion of "official" was of particular relevance to the subject of immunity of State officials from foreign criminal jurisdiction, which was why it was expressly mentioned in the topic's title. Any proper analysis of that notion had to rest on four initial premises: (*a*) there was no general definition of the notion of "official" in international law; (*b*) a definition of the term "official" must be formulated in such a way as to cover both persons enjoying immunity *ratione materiae* and those enjoying immunity *ratione personae*; (*c*) the term chosen must cover all the persons concerned while at the same time taking account of the differences between them; and (*d*) the term used must be uniform and comparable in all languages and, as far as possible, consonant with the Commission's established practice. The definition of "official" therefore raised two different, but complementary and interdependent, sets of substantive and linguistic questions, which were dealt with separately in the third report.

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[166] At its sixty-fifth session (2013), the Commission had before it six draft articles proposed by the Special Rapporteur in her second report (see *Yearbook … 2013*, vol. I (Part One), document A/CN.4/661, annex) and provisionally adopted three draft articles and the commentaries thereto (*ibid*., vol. II (Part Two), pp. 39 *et seq.*, paras. 48–49).

[167] Reproduced in *Yearbook … 2014*, vol. II (Part One).

[168] Mimeographed, available from the Commission's website.

[169] *Yearbook … 2012*, vol. II (Part One), document A/CN.4/654, chap. III.

[170] Document A/CN.4/596 and Corr.1, mimeographed; available from the Commission's website, documents of the sixtieth session (2008). The final text will be reproduced in an addendum to *Yearbook … 2008*, vol. II (Part One).

4. As far as substantive matters were concerned, the third report focused on determining criteria for identifying the categories of persons who might enjoy immunity from foreign criminal jurisdiction. In that connection, it was vital to note that the notion of "official" must be addressed horizontally in order to ensure that its characteristics were valid for both persons enjoying immunity *ratione materiae* and those enjoying immunity *ratione personae*. While the Commission had identified persons enjoying immunity *rationae personae eo nomine* (Head of State, Head of Government and Minister for Foreign Affairs[171]), when it came to immunity *ratione mataeriae*, it was impossible to list all the office or post holders who could be classified as a "State official" for the purposes of the topic under consideration, owing to the widely differing ways in which States were organized. As international law supplied no general definition of the notion of "official", it was used in the various legal systems of States to describe persons with very disparate functions. Persons enjoying immunity *ratione materiae* could therefore be determined only on a case-by-case basis by using "identifying criteria". She had resorted to national and international case law, treaty practice and the Commission's earlier work in order to pinpoint those criteria. The analysis of national and international case law had encompassed all judicial decisions related to immunity from jurisdiction, even including those that did not strictly concern the field of criminal jurisdiction. For that reason, decisions with regard to immunity from civil jurisdiction had been taken into consideration, because they were of relevance when determining the characteristics of the notion of "official". The examination of treaty practice and the Commission's earlier work had covered instruments that did not fall within the scope of the topic, but that were useful in establishing the criteria for determining who was a State official for the purposes of the draft articles under consideration. On the basis of the study of practice, the Special Rapporteur, in paragraph 111 of her third report, drew the following conclusions with respect to the criteria which clarified the notion of "official": (*a*) the official must have a connection with the State, which might take several forms and which might be permanent or temporary; (*b*) the official must act as a representative of the State or perform official functions on its behalf; and (*c*) the official must exercise elements of governmental authority and act in the name and on behalf of the State. In order to establish whether a person was an "official", in particular for the purposes of immunity *ratione materiae*, it was necessary to determine on a case-by-case basis whether all those criteria were met.

5. As far as questions of terminology were concerned, in her third report, the Special Rapporteur drew attention to the fact that the term "official" had been chosen by the previous Special Rapporteur, Mr. Kolodkin, in preference to "organ", although he had left open the possibility of revisiting that choice.[172] Account had likewise been taken of the fact that various members of the Commission had considered that it was possible to use the words "representatives" in the English text or *agents* in the French text. The terms *funcionario*, "official" or *représentant* might not be the most appropriate ones to cover all the categories of persons who enjoyed immunity from foreign criminal jurisdiction and they meant something different in Spanish, English and French. It would be helpful to know if that was also true of the Arabic, Chinese and Russian versions. In any event, as stated in footnote 237 of the report of the Commission on the work of its sixty-fifth session,[173] the use of the term "officials" would be subject to further consideration which, according to the workplan, had to take place at the current session. To that end, the third report comprised both an individual and a comparative analysis of the terms *funcionario, représentant* and "official" in order to determine whether they were a suitable description of persons who enjoyed immunity from foreign criminal jurisdiction.

6. Apart from the clear and uniform usage of expressions such as "Head of State", "Head of Government" and "Minister for Foreign Affairs", the case law and conventions that had been studied, and even legal writings, used different terms to describe the category of persons to which the Special Rapporteur referred in her third report. It was essential to adopt a term that could be used interchangeably in all the various language versions of the draft articles and, to that end, three criteria were proposed in paragraph 113 of the third report, namely: (*a*) the term must be broad enough to encompass all the persons who enjoyed immunity; (*b*) the term must follow the Commission's established practice; and (*c*) the term chosen must not mislead national officials responsible for applying the rules on immunity from criminal jurisdiction. It was therefore necessary to avoid the use of terms with a precise and different meaning in various countries.

7. In view of the foregoing, in her third report the Special Rapporteur concluded that, for the sake of the requisite clarity and legal certainty, it would be wise to select a single term in all the language versions to designate persons who enjoyed immunity from foreign criminal jurisdiction. It was plain from the comparative examination of the terms currently used by the Commission that only the word "official" could be used in a broad sense to cover all the categories of persons who enjoyed immunity from criminal jurisdiction. Strictly speaking, the terms *funcionario* and *fonctionnaire* designated persons who had a link with the administrative system, but who did not engage in any political activity. They could not therefore be used to designate the Head of State, Head of Government or ministers. The term "representative", which emphasized the representative capacity of the persons whom it designated, was not suitable when referring to all the categories of persons who might enjoy immunity and who, apart from the Head of State, Head of Government and Minister for Foreign Affairs, did not all perform that type of function *per se* under the rules of international law. It would therefore be preferable to employ the expressions "agent of the State" or "organ of the State" and their equivalents in all the language versions. Those two terms had the advantage of being frequently used in international practice to designate any person with a link to the State and who acted in its name and on its behalf. Furthermore, as they were generally construed broadly, they could be used to designate persons who represented the State internationally

[171] See *Yearbook … 2013*, vol. II (Part Two), p. 39 (draft article 3).

[172] See *Yearbook … 2008*, vol. II (Part One), document A/CN.4/601, p. 186, para. 108.

[173] *Yearbook … 2013*, vol. II (Part Two), p. 39.

and persons who exercised elements of governmental authority. The term "organ" might be the most appropriate; the Commission had already used it in its work on two subjects connected with immunity from foreign criminal jurisdiction, namely jurisdictional immunities of States and their property[174] and responsibility of States for internationally wrongful acts.[175] Of course, in those cases, that term referred to persons and entities, but there was nothing to prevent its being used in the topic under consideration to refer exclusively to natural persons. Moreover, it would be a more suitable designation for the Head of State and Head of Government, who were rarely called "agents" in legal and diplomatic practice.

8. Moving on to the draft articles, she explained that, in former draft article 3 (Definitions), which was contained in her second report[176] and which would become draft article 2, she proposed the addition of a subparagraph (*e*) which provided a general definition of the notion of "State official" (or "organ of the State") that would apply to any natural person who might enjoy immunity from foreign criminal jurisdiction. It also reflected the distinction drawn between those officials depending on whether their immunity was *ratione personae* or *ratione materiae*— the former were members of the "troika" and the second were identified on the basis of the criteria set out in paragraph 108 of the third report. Each category formed the subject of a separate subclause. Subclause (i) referred to the Head of State, Head of Government and Minister for Foreign Affairs. Subclause (ii) referred to the remaining representatives or organs of the State. The source of the wording of that new subparagraph (*e*) (ii) was to be found in draft articles 4 and 5 on responsibility of States for internationally wrongful acts and therefore included any person who, or entity which, exercised elements of governmental authority, even though that person or entity might not represent the State. The exercise of governmental authority was therefore a crucial feature of a representative (or organ) of the State.

9. Draft article 5, which was devoted to the definition of the subjective scope of immunity *ratione materiae*, was calqued on draft article 4, which had been provisionally adopted by the Commission in 2013.[177] The reference to the troika had been replaced with "State officials who exercise elements of governmental authority". That draft article therefore incorporated the criterion of the exercise of elements of governmental authority as a means of defining the subjective scope of immunity *ratione materiae*. The exercise of elements of governmental authority, combined with the essential criterion of the existence of a link with the State delegating that exercise, justified recognition of immunity from criminal jurisdiction, in the interests of the State, in order to protect its sovereign prerogatives. There was a link between the State and the person enjoying immunity *ratione materiae* as soon as the latter had the capacity to perform acts presupposing the exercise of elements of governmental authority. That link between the official and the State could not be confused with the acts protected by immunity, which constituted the second normative element of immunity *ratione materiae*. A specific act would have such immunity if it could be termed "an act performed in an official capacity" and if the act was performed by a person while he or she was a State official. Since State officials had immunity from foreign criminal jurisdiction in order to safeguard State sovereignty, that immunity could be granted only to those officials who had the capacity to exercise sovereign prerogatives, in other words, governmental authority. Consequently, immunity was granted to State officials within the meaning of the draft articles, but not to all State officials in the broad sense, "as a general rule" [*con carácter general* or *d'une manière générale*].

10. Determining instances involving the genuine exercise of governmental authority required a case-by-case analysis that took account of judicial practice. The latter showed that, generally speaking, immunity *ratione materiae* was most often invoked in favour of senior or mid-ranking officials. In any event, it could not be concluded that any person holding a permanent link with a State which could entitle that person to be called an official in the broad sense, necessarily enjoyed immunity *ratione materiae*, or, conversely, that only senior officials could claim it. Lastly, it was necessary to remember that a former Head of State, Head of Government or Minister for Foreign Affairs might enjoy immunity *ratione materiae* if they met the normative criteria therefor. For that reason, the troika might in some circumstances come within the subjective scope of that immunity as defined in draft article 5.

11. Mr. MURASE said that he regretted the lack of consensus on the purpose of the draft articles. Did the Commission intend to establish the principle that high-ranking State officials enjoyed immunity at the risk of fostering impunity or, on the contrary, was it trying to draw up rules to restrict the scope of immunity in order to bar the impunity of the perpetrators of serious international crimes? From a legal perspective those were two quite separate matters. Open-ended recognition of immunity would lead to the impunity of those perpetrators. It was regrettable that the Commission, by adopting draft article 3 at the previous session, seemed to be heading in that direction. It was also going against the *lex lata* embodied in article 27 of the Rome Statute of the International Criminal Court and the international community's normative demand that impunity be countered. Even if the jurisdiction of national courts varied from one legal system to another and could not be equated with the mandate of international criminal courts and tribunals, domestic and international regimes, far from being diametrically opposed, should be mutually supportive. In addition, the Commission should be faithful to its earlier work, in particular article 7 of the 1966 draft code of crimes against the peace and security of mankind.[178] It would therefore be desirable to add a

[174] The draft articles on jurisdictional immunites of States and their property and the commentaries thereto are reproduced in *Yearbook … 1991*, vol. II (Part Two), pp. 13 *et seq.*, para. 28.

[175] General Assembly resolution 56/83 of 12 December 2001, annex. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

[176] See *Yearbook … 2013*, vol. II (Part One), document A/CN.4/661, annex.

[177] *Ibid.*, vol. II (Part Two), p. 39.

[178] *Yearbook … 1996*, vol. II (Part Two), pp. 17 *et seq.*, in particular pp. 26–27 (draft article 7).

third paragraph to draft article 1, in the form of a "without prejudice" clause worded either:

> "The present draft articles are without prejudice to the crimes specified in draft article X [on the 'exceptions']."

or

> "Nothing in the present draft articles shall affect individual criminal responsibility for genocide, crimes against humanity and serious war crimes [or any other crimes specified in draft article X [on the 'exceptions']."

Such a clause would make it clear that the draft articles addressed only those crimes for which the principal leaders of a State would enjoy immunity from foreign criminal jurisdiction under domestic law and would lay the foundations for "exceptions" to immunity *ratione personae* and immunity *ratione materiae*. The Special Rapporteur should define those exceptions and give them the requisite scope.

12. The normative content of the concept of immunity *ratione materiae* remained unclear. If it was mainly predicated on the concept of "acts performed in an official capacity", it might be a useful tool for effectively precluding the immunity of perpetrators of serious international crimes for, as Judges Higgins, Kooijmans and Buergenthal had found in paragraph 85 of their joint separate opinion in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, it was increasingly claimed in the literature that serious international crimes could not be regarded as official acts because they were neither normal State functions, nor functions that a State alone could perform. It was regrettable that the members of the Commission had been unable to agree on the relationship between immunity *ratione personae* and immunity *ratione materiae*. Yet, on the basis of that separate opinion, it might have been assumed that immunity *ratione materiae,* as *lex specialis,* would limit the scope of the immunity *ratione personae* granted to some State officials in draft article 3 and would constitute the general rule. The wording of draft article 5 stood in the way of that logic, for immunity *ratione materiae* was presented there not as a restrictive principle, but as the stand-alone basis for additional immunity. The explanations provided in the second and third reports with respect to immunity *ratione personae* and immunity *ratione materiae* overlapped to some extent.

13. The use of the term "official", which was associated with the status of perpetrators, ought to have been discussed in relation to draft article 1, for draft article 5 focused on the nature of acts which might give rise to immunity. In the commentary, it would be necessary to consider the acts of local officials who might exercise elements of governmental authority, while at the same time bearing in mind the fact that the draft articles were concerned with "State officials", to the exclusion of other officials.

14. In view of the controversy which it aroused and its various connotations, the expression "immunity *ratione materiae*" should be replaced in draft article 5 with "immunity based on the exercise of official functions". The wording of that draft article, which was too broad since it encompassed all State officials, should therefore be amended to read along the lines of draft article 4. In draft article 2 (*e*) (i), it would be wise to make it clear that *de facto* officials were not covered by the proposed definition. Lastly, the expression "exercise (elements of) governmental authority", employed in draft articles 5 and 2 (*e*) (ii), might prove confusing, since draft article 2 defined State officials as any person who represented the State or exercised elements of governmental authority, whereas draft article 5 stipulated that immunity *ratione materiae* could be granted only to State officials who exercised governmental authority. In other words, officials who represented the State but who did not exercise governmental authority would not be entitled to immunity *ratione materiae*. If that were indeed the case, the Special Rapporteur should explain why those State officials were mentioned in draft article 2.

15. Mr. MURPHY, after drawing attention to some problematic passages in the English translation of the Special Rapporteur's third report, said that decisions on immunity in civil cases did not necessarily support propositions relating to immunity from foreign criminal jurisdiction and must therefore be analysed with care. For many years, when the authorities of the United States appeared as *amicus curiae* in a civil case where the defendant was a State official or former State official, they systematically included in their brief wording to the effect that their stance in the civil context did not prejudge their position in a criminal case. Two decisions in criminal cases, which had been omitted from the Special Rapporteur's third report, but which had been addressed in the Commission's earlier work, were relevant to the topic under consideration: those in *United States of America* v. *Noriega* and *In re Doe*.

16. It would be undesirable to replace "official" with "organ" in English, because that term hardly ever referred solely to natural persons, but to organizational units of a government or of an international organization. The most recent case law of the United States Supreme Court (*Samantur* v. *Yousuf*) confirmed that position and had invalidated some lower courts' decisions cited in the third report. The Special Rapporteur seemed to have used the articles on responsibility of States for internationally wrongful acts as the basis for her suggestion, yet caution was needed when making that kind of transposition. For example, the idea that a State official's motivation had no bearing on the attribution of his or her conduct to the State, so long as he or she had been acting as an organ of the State, could not be transposed to immunity *ratione materiae*, for the State official's motivation was indeed pertinent to the question of whether he or she had acted on behalf of the State. The term "State official" was commonly used in that context and it covered any person who represented the State or acted in an official capacity on its behalf, which broadly squared with the purposes of the draft articles. It was therefore not desirable to abandon it at the current stage.

17. There were two possible ways of approaching the definition of "State officials". The first would consist

in ascertaining the classes of persons who enjoyed immunity *ratione materiae* without defining them, as had been done for the troika in the case of immunity *ratione personae*, by consistently referring to them as "persons who represent the State or perform an act on behalf of a State". The second route, that chosen by the Special Rapporteur, consisted in defining State officials. The definition proposed in draft article 2 seemed to be sufficiently broad, but a more thorough discussion of its various elements seemed necessary and the commentary should provide an indicative list of the types of persons covered, or not covered, by that definition, accompanied by the reasons therefor. It was curious that this draft article mentioned two categories of State officials, the troika and others, thereby merging the status-based notion of immunity *ratione personae,* which was predicated on the capacity of the persons enjoying it, and the function-based concept of immunity *ratione materiae,* which was unrelated to the question of whether or not the persons in question were still in office. It would therefore be preferable to roll subparagraphs (i) and (ii) into one. The use of the present tense in draft articles 2 (*e*) (ii) and 5 ("who acts" and "who exercise") might be confusing, for the idea behind those provisions was to recognize that immunity *ratione materiae* continued even after the State official left office. The wording of the final phrase "whatever position the person holds in the organization of the State", which was designed to widen the definition, in fact had the opposite effect, since the person in question might not actually have a position in the Government.

18. Furthermore, in the English version of draft article 5, it might be advisable to replace the expression "elements of governmental authority" with "elements of sovereign authority". In the English version, the heading of that draft article could be aligned with that of draft article 3 and would then read "Persons enjoying immunity *ratione materiae*" and its text would read: ["A [State official] enjoys immunity *ratione materiae* from the exercise of foreign criminal jurisdiction." [The term "State official" could be replaced, if the Commission chose not to define such persons, with an expression describing the class of persons covered.]] Another draft article could be devoted to the scope of immunity *ratione materiae* along the lines of draft article 4. He was in favour of referring draft articles 2 and 5 to the Drafting Committee.

19. Mr. CANDIOTI said he believed that Mr. Murase was exaggerating when he considered that the Commission was tending to replace the principle of immunity with the principle of impunity. Immunity was an exception to the jurisdiction of national and international judicial bodies and, as such, must be narrowly construed in accordance with the universally accepted rules of international law.

20. Mr. PETRIČ said that he shared Mr. Candioti's viewpoint. When the Commission had embarked upon its work on the topic under consideration, it had indeed intended to establish the principle that immunity was the exception; it seemed that impunity was tending to become the exception.

The obligation to extradite or prosecute (*aut dedere aut judicare*)[179] (A/CN.4/666, Part II, sect. G, A/CN.4/L.844[180])

[Agenda item 3]

Report of the Working Group

21. Mr. KITTICHAISAREE (Chairperson of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*)) said that, at the current session, the Commission had reconstituted the Working Group, which had met on 6 May and 4 June 2014. In its report, contained in document A/CN.4/L.844, the Working Group summarized its conclusions and recommendations on the topic under consideration and examined several issues raised by delegations to the Sixth Committee that had not been covered in its 2013 report, namely: (*a*) the status of the obligation to extradite or prosecute in customary international law; (*b*) gaps in the existing treaty regime; (*c*) the transfer of a suspect to an international or special court or tribunal as a potential third alternative to extradition or prosecution; (*d*) the relationship between the obligation to extradite or prosecute and *erga omnes* obligations or *jus cogens* norms; and (*e*) the continued relevance of the 2009 general framework.

22. All the questions requiring investigation had been considered and the report, together with that of 2013, concluded the Working Group's deliberations. It therefore recommended that the Commission: (*a*) adopt the 2013 report and the current final report of the Working Group which, in the Commission's view, would provide useful guidance for States; and (*b*) conclude its consideration of the topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)".

23. The CHAIRPERSON said he took it that the Commission wished to take note of the Working Group's final report contained in document A/CN.4/L.844, on the understanding that it would be combined with that of 2013, and adopted by the Commission when it considered its draft annual report at a subsequent meeting.

It was so decided.

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[179] Between 2006 and 2011, the Commission considered four reports of the Special Rapporteur, Mr. Zdzislaw Galicki (*Yearbook … 2006*, vol. II (Part One), document A/CN.4/571 (preliminary report); *Yearbook … 2007*, vol. II (Part One), document A/CN.4/585 (second report); *Yearbook … 2008*, vol. II (Part One), document A/CN.4/603 (third report); and *Yearbook … 2011*, vol. II (Part One), document A/CN.4/648 (fourth report)). At its sixty-first session (2009), the Commission established an open-ended Working Group on the topic under the chairpersonship of Mr. Alain Pellet, which defined a general framework for consideraton of the topic (*Yearbook … 2009*, vol. II (Part Two), p. 143, para. 204). At its sixty-second session (2010), the Working Group was reconstituted and, in the absence of its Chairperson, was chaired by Mr. Enrique Candioti (*Yearbook … 2010*, vol. II (Part Two), pp. 191–192, paras. 337–340). At its sixty-fourth (2012) and sixty-fifth (2013) sessions, the Commission reconstituted the open-ended Working Group on the topic, chaired by Mr. Kriangsak Kittichaisaree (*Yearbook … 2012*, vol. II (Part Two), pp. 74–76, paras. 208–221, and *Yearbook … 2013*, vol. II (Part Two), p. 74, paras. 148–149). At its sixty-fifth session, the Commission took note of the Working Group's report (*Yearbook … 2013*, vol. II (Part Two), annex I, pp. 84–92).

[180] Mimeographed, available from the Commission's website.

24. At the request of Mr. Candioti, Mr. Park and Mr. Saboia and on behalf of the whole Commission, the CHAIRPERSON thanked Mr. Kittichaisaree for his invaluable contribution as Chairperson of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*).

The meeting rose at 5.35 p.m.

3218th MEETING

Tuesday, 8 July 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Cooperation with other bodies

[Agenda item 14]

Statement by the Secretary-General of the Asian–African Legal Consultative Organization

1. The CHAIRPERSON welcomed Mr. Mohamad, Secretary-General of the Asian–African Legal Consultative Organization (AALCO), and invited him to address the Commission.

2. Mr. MOHAMAD (Secretary-General of the Asian–African Legal Consultative Organization) said that among the contributions to international law that AALCO was mandated to make was the exchange of information and views on the topics under consideration by the Commission. The fulfilment of that mandate over the years had helped to forge a closer relationship between the two organizations, which were also represented at each other's sessions as a matter of customary practice.

3. Among the items on the Commission's agenda, the topic of identification of customary international law was particularly relevant due to difficulties in identifying existing rules of customary international law and in their application by domestic courts and judges, lawyers, arbitrators and legal advisors who might lack formal training in international law. Aspects of the topic that were of particular interest to AALCO members included the question of the hierarchy of sources. The search for evidence of customary international law had traditionally focused on the decisions of international tribunals, yet a truer sense of the position of States might be arrived at through an examination of domestic practice and the decisions of regional and subregional courts. With respect to the decisions of international tribunals, consideration should also be given to dissenting opinions and separate opinions. Statements by States in international forums and resolutions adopted by international and intergovernmental organizations could also help to establish an accurate picture of their position on particular questions. Lastly, any set of rules for the identification of customary international law should be flexible enough to take account of the constantly evolving nature of custom and practice.

4. At the fifty-second annual session of AALCO, held from 9 to 12 September 2013 in New Delhi, a number of comments and suggestions on the topic had been made by member States. A question had been raised as to whether the Special Rapporteur considered the resolutions of international and regional organizations to be part of customary international law. Two member States had suggested that the concept of *jus cogens* not be included within the scope of the topic. One State had expressed the view that the draft conclusions should reflect the practice of States from all of the principal legal systems of the world and from all regions. It had also been suggested that the relationship of customary international law with treaties and with the general principles of law might be discussed.

5. In November 2013, a two-day workshop had been organized by the AALCO Secretariat, in conjunction with the National University of Malaysia, to consider selected items on the Commission's agenda. Participants had included representatives of member States, academics and students from Malaysian universities. Three members of the Commission had given presentations on the topics of protection of persons in the event of disasters, protection of the atmosphere and immunity of State officials from foreign criminal jurisdiction. Following the success of the workshop, it had been agreed that it should be held annually and that a Working Group on the identification of customary law should be established to facilitate the work of the Special Rapporteur on that topic. The group would be documenting the contributions of Asian and African States to the progressive development of international law and transmitting the recommendations of AALCO member States on issues raised by the Special Rapporteur.

6. The majority of member States of AALCO, while being mindful of the ongoing political negotiations to address commitments under the climate change regime, believed that the protection of the atmosphere was a matter of growing concern for the international community. With regard to the definition of the atmosphere set out in the Special Rapporteur's first report on the topic (A/CN.4/667), draft guideline 1 could perhaps be supplemented by a detailed description of the atmosphere's various layers and of its other gaseous content. Reference to such issues as transboundary air pollution and climate change was essential for a comprehensive understanding of the topic, but those issues should not be part of a substantive discussion. The principles of international environmental law that had evolved over the years through the judgments of international courts and tribunals and the customary practice of States focused on the precautionary approach, rather than on the principle of prevention. However, there was a pressing need to prevent any harm to the atmosphere, because of the potential wide-ranging impact

of atmospheric pollution. Accordingly, international cooperation and such key principles of international environmental law as equity, sustainable development and common but differentiated responsibilities must be the foundation for further progress on the topic. The AALCO Secretariat supported the Special Rapporteur's view, set forth in draft guideline 3 (*a*), that the protection of the atmosphere should be accorded the legal status of a common concern of humankind.

7. Turning to the protection of persons in the event of disasters, he said that AALCO member States had welcomed the inclusion in the Special Rapporteur's seventh report (A/CN.4/668 and Add.1) of draft article 14 *bis*, dealing with the protection of relief personnel, equipment and goods. However, concerns had been expressed about the reference in draft article 12[181] to the "intergovernmental organizations" and "non-governmental organizations" that might be involved in disaster relief operations, particularly with respect to their credentials and credibility.

8. AALCO member States welcomed the discussion in the report of the treaties recently adopted in the region: the ASEAN Agreement on Disaster Management and Emergency Response of 2005 and the SAARC [South Asian Association for Regional Cooperation] Agreement on Rapid Response to Natural Disasters of 2011. They were relevant to draft article 17, under which special rules of international law applicable in disaster situations had precedence if other rules conflicted with them, and to draft article 18, which presupposed that the rules of international law remained the governing rules during disaster situations (see A/CN.4/668 and Add.1). Thus, the general principles of international law mandating respect for the sovereignty, territorial integrity and political independence of affected States were to be given primacy. That was something that AALCO member States felt strongly should be the case, even when an affected State sought external assistance, something which, they contended, it was under no obligation to do.

9. With respect to the immunity of State officials from foreign criminal jurisdiction, AALCO member States had commented that the topic must be approached from the twofold perspective of *lex lata* and *lex ferenda* (law as it is and law as it ought to be). The topic should focus on the immunities accorded under international law, in particular customary international law, rather than under domestic law. With regard to draft article 2, one delegate had stated that criminal immunities granted in the context of diplomatic or consular relations, headquarters agreements or similar arrangements should be excluded from the scope of the topic, as they were settled areas of law. With regard to draft article 3, the view had been expressed that all State officials should enjoy immunity and that the word "certain" should be deleted. The point had been made that the case of officials like the President or Prime Minister, who acted as Head of State as well as of Government, should be addressed in draft article 4.[182]

10. The *Arrest Warrant of 11 April 2000* case had been cited in support of the view that immunity *ratione personae* should be extended, not only to the troika of Head of State, Head of Government and Minister for Foreign Affairs, but also to other high-ranking officials, such as ministers of defence and ministers of trade. Caution must also be exercised, however: international law had not advanced to the point where the scope of immunity *ratione personae* could be understood to include the high-ranking officials he had just mentioned. AALCO recognized that times had changed and that international affairs were now conducted by a wide range of State officials. Therefore, close consideration should be given to the issue of extending immunity beyond the troika. For that purpose, the Commission would have to take account of a number of factors, such as current State practice in various parts of the world, judicial opinion expressed in domestic jurisdictions and the opinions of scholars.

11. In closing, he assured the Commission of his organization's continuing cooperation in its work.

12. Mr. KITTICHAISAREE said that there were two subjects to which AALCO might wish to give consideration: issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction; and, with regard to the immunity of State officials from foreign criminal jurisdiction, how to strike a balance between the concerns of States regarding national reconciliation and regional peace and the need to ensure that there was no impunity for persons responsible for serious crimes, in particular Heads of State and Heads of Government.

13. Mr. HASSOUNA commended AALCO on its contribution to supporting the work of the Commission. In that regard, he said that it would be useful if AALCO could suggest new topics for inclusion on the Commission's programme of work and encourage its member States to respond to the Commission's questionnaires seeking their opinions on the topics under consideration. As the workshop organized by AALCO in conjunction with the National University of Malaysia had been so beneficial for all participants, he urged the organization to undertake similar initiatives with other academic institutions.

14. Mr. MOHAMAD (Secretary-General of the Asian–African Legal Consultative Organization), responding to Mr. Kittichaisaree's comments, said that AALCO had already started discussing the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction, including during an annual workshop on the law of the sea, and would continue to give consideration to that matter, with the support of various experts. With regard to impunity for serious crimes, he said that there was a duty to ensure respect for international law in that regard and discussions would be held with member States on that matter.

15. In most Asian and African countries, there was little familiarity with the work of the International Law Commission, especially among university law students. For that reason, the AALCO Secretariat would welcome the opportunity for academics and practitioners to meet with Commission members in AALCO member States; regrettably, it did not have the resources to fund Commission members'

[181] *Yearbook … 2013*, vol. II (Part Two), p. 55 (draft article 12).

[182] See *Yearbook … 2013*, vol. II (Part One), document A/CN.4/661.

visits. The AALCO website[183] had a page devoted to the International Law Commission, and its Secretariat would continue to remind member States to provide feedback to the Commission on issues of interest to its work.

16. Regarding assistance to the Commission in identifying possible future topics for its programme of work, he said that AALCO planned to produce a study on cybersecurity, an issue that had not been addressed at the multilateral level, and would forward the results to the Commission. Another topic that AALCO considered worthy of the Commission's attention was international investment law.

17. Mr. MURPHY said that he appreciated the measures taken by AALCO to engage with the work of the Commission and volunteered to help in finding ways for Commission members to attend AALCO meetings. With regard to the immunity of State officials from foreign criminal jurisdiction, the Secretary-General seemed to be suggesting that the Commission should reconsider the question whether the persons who enjoyed immunity *ratione personae* should be limited to the troika or constitute a broader set of senior State officials. The African Union Summit had just approved a draft protocol which said that "any serving [African Union] Head of State or Government … or other senior state officials" could not be the subject of charges before the African Court of Justice and Human and Peoples' Rights.[184] By referring to "other senior State officials", the African Union had implied its support for the notion that immunity *ratione personae* should apply to a broader set of officials than the troika. The draft protocol did not appear to provide for any exceptions to immunity, in relation to particular kinds of crimes, for example; instead, a broad-based immunity, at least in the context of that Court, seemed to be advocated. He asked whether the Secretary-General wished to share any reflections on the matter.

18. Mr. MOHAMAD (Secretary-General of the Asian–African Legal Consultative Organization) said that AALCO was not suggesting that the Commission should review its position on who should enjoy immunity from foreign criminal jurisdiction. There were divergent views among member States on whether such immunity should be afforded only to the troika, and the Secretariat would endeavour to keep the Commission informed of the prevailing position. It would also study the issue raised by the draft protocol concerning the African Court of Justice and Human and Peoples' Rights, and it would keep the Commission abreast of any developments in that regard.

19. Mr. TLADI said that he personally read the draft protocol as creating two specific regimes, one establishing immunity *ratione personae* for Heads of State and Heads of Government, but not for Ministers for Foreign Affairs, and a second, applying to other State officials and giving them immunity solely with respect to conduct in the exercise of their functions, in other words immunity *ratione materiae*. He did not support the expansive reading reportedly adopted by some AALCO members.

20. Ms. JACOBSSON asked whether the agenda of the next annual session of AALCO would include the new topics in the Commission's programme of work. As Special Rapporteur on the protection of the environment in relation to armed conflict, she would find it helpful to have the comments of AALCO member States on that new topic. While AALCO member States should by all means be encouraged to respond to the Commission's questionnaires concerning its reports, they might also consider addressing the more limited list of specific issues on which comments were of particular interest to the Commission that was included in its annual reports. Those issues could also be reflected on the AALCO website, to facilitate comments by AALCO member States.

21. Mr. HUANG said that AALCO deserved to receive more attention from the Commission, given the large number of member States it represented and the large share of the world population for which they accounted. The Asia and Pacific region had made enormous progress in terms of political, economic and social development, and its role in international legal affairs had become increasingly important. The comments and recommendations of AALCO member States concerning the topics on the Commission's agenda were a valuable reference. The Commission should strengthen its cooperation and exchanges with regional and international organizations on legal affairs, including AALCO, in joint efforts to promote the progressive development and codification of international law.

22. Mr. MOHAMAD (Secretary-General of the Asian–African Legal Consultative Organization) invited Commission members to attend the fifty-third annual session of AALCO, to be held in Tehran. Included in the agenda for that meeting were the four topics of the International Law Commission to which he had referred in his statement. Additional meeting time could easily be allocated if a special rapporteur from the Commission wished to participate in the meeting. In addition, meetings might be organized for Commission members to educate law school students and even governmental officials in various parts of Asia and Africa on the work of the International Law Commission.

23. Mr. EL-MURTADI SULEIMAN GOUIDER said that AALCO played a significant role in the legal affairs of a large group of Asian and African countries, and the input it provided to the Commission was therefore very valuable.

24. Mr. WAKO said that he found the reports produced by AALCO on its annual sessions to be very useful, and he hoped that AALCO would consider allowing the Commission access to them in a timely manner, thereby enabling the Commission to take better account of the organization's input.

25. Given that the identification of customary international law required an assessment of general practice and an acceptance of that practice as law, it was important for AALCO member States to respond to the relevant questionnaire. The issue of immunity, which was so closely related with that of impunity, was a topical and dynamic issue on which the Commission would also like to have

[183] www.aalco.int/ilcmatters.

[184] See article 46A *bis* of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

input from AALCO member States. He looked forward to closer cooperation with that organization.

26. Mr. MOHAMAD (Secretary-General of the Asian–African Legal Consultative Organization) said that the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties would not be removed from the programme of work of AALCO. The Secretariat would transmit to the Commission the outcome of AALCO member States' deliberations on the topic of immunity of State officials from foreign criminal jurisdiction.

27. The CHAIRPERSON thanked the Secretary-General of AALCO for the valuable information he had provided on the work of his organization.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/666, Part II, sect. B, A/CN.4/673, A/CN.4/L.850)

[Agenda item 5]

Third report of the Special Rapporteur (*continued*)

28. The CHAIRPERSON invited the Commission to resume its consideration of the third report of the Special Rapporteur on the topic of immunity of State officials from foreign criminal jurisdiction (A/CN.4/673).

29. Mr. TLADI said that the third report comprehensively traced the domestic jurisprudence, treaty practice and practice of the Commission on the topic and gave a general sense of the direction that the Special Rapporteur wished to take in future reports. Of the two draft articles she had proposed, he was largely in agreement with draft article 2 (*e*), but took issue with the substance of draft article 5.

30. The first two of the three important characteristics of immunity *ratione materiae* listed by the Special Rapporteur in paragraph 12 of her report provided the substance for the identification of that form of immunity. They were: that it was granted to all State officials; and that it was granted only with respect to acts that could be characterized as "acts performed in an official capacity". Those two requirements, though related, were separate and independent; the former related to the actor—the "who"—while the latter was directed at the nature of the act—the "what". In various places in the report, the Special Rapporteur seemed to conflate the two elements; nevertheless, it was important to clarify the conceptual distinction between the two.

31. In paragraph 34 of her third report, the Special Rapporteur quoted several cases, purportedly with the intent of distilling the requirements for the use of the term "official". In several instances, the emphasis appeared to fall, not so much on the "who", as on the "what"—on the fact that the acts under consideration were attributable to the State. Descriptions of acts "performed as part of his [or her] functions" or acts "under the control of the State" described not the official, but rather the nature of the act. Those were not, to borrow language from paragraph 18 of the third report, "identifying criteria" which provided sufficient reason to conclude that a given person was an "official" for the purposes of the draft articles. Instead, they appeared to speak to the second requirement, since they seemed to be directed to the question whether the conduct of a particular individual could be characterized as "acts performed in an official capacity".

32. The two phases of determining the applicability of immunity *ratione materiae* were implicit in the decision of the International Court of Justice in the case concerning *Certain Questions Of Mutual Assistance In Criminal Matters (Djibouti* v. *France)*. It was clear from the wording of paragraphs 35 and 194 of the judgment that the Court had accepted as a matter of fact that the *procureur de la République* and the Head of National Security were officials, and that it had devoted the most attention to the second element, namely the "what", or the "act". It had found that there had been no breach of immunity, because Djibouti had failed to claim "ownership" of the acts of those individuals. However, that judgment had linked the two elements, the "who" and the "what", in a way that made them difficult to separate. Although the words "organs", "agencies" and "instrumentalities" appeared to refer to the "who", in the context of paragraph 196 of the judgment, they described the act. He therefore disagreed with the Special Rapporteur's conclusion in paragraph 41 of her third report that in the Court's decision the term "organ" referred to the "actor".

33. Moreover, a closer reading of paragraphs 38 and 44 of the judgment of 29 October 1997 handed down by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in *Prosecutor* v. *Blaškić* (cited in paragraphs 48 and 49 of the report) showed that the phrases "mere instruments of the State", "instrumentalities of the State" or "acting on behalf of" a State were connected not, as the Special Rapporteur suggested, to the "who", but to the "what". That became especially clear in paragraph 51 of the judgment, where the Court envisaged a case when the State official (the first element) was not acting as an instrumentality of his or her State (the second element).

34. At various places in the report, the Special Rapporteur made much of the distinction, in both treaty law and court practice, between the troika and other officials. His own reservations concerning the treatment of the troika in the previous report[185] still stood.[186] While the Commission's approach to immunity *ratione personae* necessitated the drawing of a distinction between the different rules applicable to immunity *ratione personae* and immunity *ratione materiae*, there was no clear need to distinguish between the troika and other officials for the purpose of defining "official". The various conventions studied by the Special Rapporteur might be relevant, but they had their limitations, since they were concerned with specific categories of officials and hence were likely to reflect subsets of the "who" that the Commission intended to cover. It might be helpful to consider the definition of "public official" contained in the African Union Convention on Preventing and Combating Corruption, which was more concise than the one to be

[185] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/661.

[186] See *Yearbook … 2013*, vol. I, 3164th meeting, pp. 21–22, paras. 20–27.

found in the United Nations Convention against Corruption, mentioned in paragraph 86.

35. As for the proposal to change the title of the topic to "immunity of State organs", it appeared from the report that the main problem lay in the lack of an exact translation into French and Spanish of the English term "official". However, the International Court of Justice seemed to have no difficulty in using *fonctionnaires* as the equivalent of "officials" in the context of the immunity of State officials. Moreover, irrespective of the term ultimately chosen, the very purpose of a clause on the use of terms was to resolve the types of inconsistencies pinpointed by the Special Rapporteur in her introductory remarks. Although the word "organ" would tie the type of immunity under consideration in more closely with the immunity of the State, he was concerned that the notion was understood to refer primarily to an entity and only supplementarily to a person. For that reason, the Special Rapporteur's proposal in paragraph 141 of her third report to use the term "organ" to refer exclusively to persons would be at variance with its meaning and was likely to lead to some confusion.

36. Although he largely supported the definition of the term "official" proposed in draft article 2 (*e*), he questioned the need for an explicit reference to the troika, whose members, as officials, were certainly entitled to immunity *ratione materiae* for the official acts which they performed. In light of the three elements identified in subparagraph (ii), namely "acts on behalf of the State", "represents the State" and "exercises … governmental authority", it was difficult to see how the troika could fail to be covered by the definition. He feared, however, that the phrase "acts on" might result in the conflation he had mentioned earlier. The Special Rapporteur should propose alternative drafting to make it plain that the definition of "official" centred on the person performing the act and not the act itself.

37. In draft article 5, the phrase "exercise governmental authority" would be superfluous if the current wording and positioning of draft article 2 were retained. If, as suggested in paragraph 148 of the third report, "governmental authority" included "legislative, judicial and executive prerogatives", then the scope of the topic would be restricted, since officials employed by the State, in other words, persons linked permanently to the administrative bureaucracy, did not generally exercise such prerogatives. For that reason, he suggested replacing "governmental authority" with "public function". Limiting the beneficiaries of immunity *ratione materiae* to those State officials who exercised governmental authority—a subset of State officials—would exclude a large section of State officials. While that would achieve the desirable objective of limiting the immunity of State officials to the greatest extent possible, he wondered if it was wise to protect the decision makers but not the poor souls who carried out the decisions and State policies. He agreed with Mr. Murphy that an indicative list of persons who might be covered by the term "official" would help the Commission to formulate an appropriate definition.

38. He was in favour of submitting the draft articles to the Drafting Committee.

39. Sir Michael WOOD said that he agreed with the main conclusion drawn by the Special Rapporteur in her third report, namely that the topic should cover all individuals acting on behalf of the State, regardless of their official position (if any), and that they might enjoy immunity *ratione materiae* with respect to certain acts. While it might be advisable to review the title of the topic, he disagreed with the suggestion that "official" be replaced with "organ". If the focus was on acts with respect to which immunity might arise, rather than on the person, then it would be superfluous to define the category or categories of persons who enjoyed immunity. Persons might enjoy immunity when they acted on behalf of the State, whoever they were and whatever position they held: they did not need to be *fonctionnaires*/officials or civil servants, however those terms were defined in domestic law.

40. While in theory it might be possible to limit the scope of the topic to certain categories of persons, it would hardly be satisfactory to do so, because the Commission would then be dealing only with part of the question of immunity *ratione materiae* and would have to specify that its approach was without prejudice to the enjoyment of immunity *ratione materiae* by other persons. That step would be unnecessary if the Commission ensured that the scope of the topic covered all individuals who might enjoy immunity *ratione materiae*, in other words, all individuals who carried out acts on behalf of the State.

41. In her third report, the Special Rapporteur examined in some detail the possible alternatives to the term "State official". Even if the latter term was retained, however, it was doubtful whether there was any need to define or delimit it. As indicated in paragraph 166 of the Secretariat memorandum,[187] there was wide doctrinal support for the proposition that immunity *ratione materiae* was enjoyed by State officials in general, irrespective of their position in the hierarchy of the State. The Special Rapporteur rightly stated, in paragraph 17 of her third report, that the term "official" in the title of the topic referred to all persons who might be covered by immunity, but she then wrongly concluded (para. 18) that the persons covered by immunity *ratione materiae* could only be determined by using "identifying criteria". A better conclusion, foreshadowed in the report of the Commission to the General Assembly on the work of its sixty-fourth session,[188] was that instead of attempting to establish a list of officials for the purposes of immunity *ratione materiae*, attention should be given to the act itself: the "what", not the "who".

42. Of the various materials examined in chapter II, section B of the third report, the most interesting for present purposes were the articles on responsibility of States for internationally wrongful acts,[189] which carefully explained when acts, including the acts of

[187] Document A/CN.4/596 and Corr.1, mimeographed; available from the Commission's website, documents of the sixtieth session (2008). The final text will be reproduced in an addendum to *Yearbook … 2008*, vol. II (Part One).

[188] See *Yearbook … 2012*, vol. II (Part Two), p. 63, para. 119.

[189] General Assembly resolution 56/83 of 12 December 2001, annex. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

individuals, were attributable to the State. They might provide a useful indication of which acts might be subject to immunity *ratione materiae*, although they would have to be examined carefully before transposing the attribution tests wholesale to the field of immunity *ratione materiae*. The conclusion drawn in paragraph 38 of the report was consistent with the fact that what mattered was not so much who the person was, but rather which acts were involved.

43. The only decision of an international court of any potential relevance to the identification of persons who enjoyed immunity was that delivered by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in *Prosecutor* v. *Blaškić*. However, it was concerned, not with immunity from criminal jurisdiction, but with immunity from the execution of a subpoena for the production of State papers. The *Arrest Warrant of 11 April 2000* case had been concerned with the position of a Minister for Foreign Affairs and referred only to persons enjoying immunity *ratione personae*. The passages cited from the case concerning *Certain Questions of Mutual Assistance in Criminal Matters* dealt with the nature of the acts performed by individuals, not with the question whether those individuals were "officials" for the purposes of immunity *ratione materiae*. None of the cases heard by the European Court of Human Rights and cited in the third report shed light on the meaning of "official". It was also unclear how the special regime under the Vienna Convention on Diplomatic Relations assisted in identifying the meaning of "State official" for other purposes. The same was true of all the other conventions discussed and of the "other work of the Commission" examined in chapter II, section B of the report.

44. The Special Rapporteur was right to conclude that all officials, all persons who acted on behalf of the State, could enjoy immunity *ratione materiae* from foreign criminal jurisdiction. Whether they did depended on their acts or omissions, not on their position or relationship to the State. However, her emphasis on two separate criteria, a "relationship with the State" and "acting on behalf of the State", was hard to understand. The first was subsumed in the second: it was sufficient to show that the acts in question had been done on behalf of the State.

45. While to a degree he shared the Special Rapporteur's wish to review the title of the topic, the alternatives that she suggested, particularly the word "organ", did not work. "Organ of a State" would be an unusual way to refer to an individual official. It might therefore be better to retain "official" and its equivalent in other languages.

46. Turning to the two draft articles proposed in the third report, he said that if a definition like the one put forward in draft article 2 (*e*) was required, although he did not believe that it was, then subparagraph (ii) would have to be greatly simplified, as it contained qualifications or restrictions of dubious relevance. The inclusion of the words "and represents the State or exercises elements of governmental authority, whether the person exercises legislative, executive or judicial functions, whatever position the person holds in the organization of the State", might unduly restrict the circle of persons who enjoyed immunity *ratione materiae*. He therefore suggested that draft article 2 (*e*) simply read "(ii) any other person who acts on behalf of the State".

47. The phrase in draft article 5, "who exercise governmental authority", seemed to confuse the persons who might potentially enjoy immunity *ratione materiae* with the acts with respect to which immunity was enjoyed. He was unconvinced that draft article 5 should be adopted at the current stage of deliberations, but even if it were to be adopted, it should be modelled on draft article 3 and should read "State officials enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction".

48. Lastly, he drew attention to some imperfections in the English translation of the report, where terminological corrections made the previous year had been ignored.

49. He was in favour of referring the two draft articles to the Drafting Committee.

Organization of the work of the session (*continued*)[*]

[Agenda item 1]

50. The CHAIRPERSON explained that, in the absence of Mr. McRae, Mr. Forteau had offered to chair the Study Group on the most-favoured-nation clause. Mr. McRae had sent a voluminous draft report for the Study Group's consideration and finalization. If he heard no objection, he would take it that the Commission wished to reconstitute the Study Group.

It was so decided.

51. Mr. FORTEAU said that the other members of the Study Group were Mr. Caflisch, Ms. Escobar Hernández, Mr. Hmoud, Mr. Kamto, Mr. Murase, Mr. Murphy, Mr. Park, Mr. Singh, Mr. Šturma, Mr. Vázquez-Bermúdez, Sir Michael Wood and, *ex officio*, Mr. Tladi.

The meeting rose at 12.55 p.m.

3219th MEETING

Wednesday, 9 July 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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[*] Resumed from the 3216th meeting.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/666, Part II, sect. B, A/CN.4/673, A/CN.4/L.850)

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the third report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/673).

2. Mr. FORTEAU said that, for the most part, he shared the views expressed by Mr. Tladi and Sir Michael Wood. It would be premature to take a position on the question of exceptions to immunity, which the Special Rapporteur would address in her fourth report, and the work of the current session was without prejudice to any position the Commission would ultimately adopt. Nevertheless, in light of the judgment handed down on 14 January 2014 by the European Court of Human Rights in the case of *Jones and Others* v. *the United Kingdom*, the Commission might need to recognize exceptions to immunity, and to acknowledge that some official acts, namely those involving international crimes, were not covered by immunity, subject to the availability of procedural guarantees intended to avoid malicious prosecution.

3. Although the assumptions made by the Special Rapporteur and the approach she had taken to the current topic were appropriate, he could not subscribe to the conclusions she had drawn, nor to the resulting draft articles. To begin with, the two draft articles were mutually inconsistent. As a matter of fact, owing to a lack of sufficient concordance between the two, draft article 5 seemed to preclude the enjoyment of immunity *ratione materiae* by persons who enjoyed immunity *ratione personae*, as had been noted by Mr. Murase. Even more problematic was the fact that the Special Rapporteur appeared not to have followed the course she had set out to take, namely, to deal separately with the persons who enjoyed immunity and the acts protected by immunity, since in the two draft articles, persons who enjoyed immunity were defined with reference to the acts they performed. However, the nature of the powers exercised could not constitute a criterion for determining which persons enjoyed immunity, given that some persons, depending on the acts they performed, acted at times *jure gestionis* and at others in the exercise of elements of governmental authority (for example, the director of a central bank might perform acts that were financial or monetary in nature). In order to apply such a criterion, it was necessary to determine on a case-by-case basis whether such persons met the conditions set out in draft article 2 (*e*); the criterion could be used only to identify the *acts* that were covered by immunity. That raised the question of how, if it was adopted it would relate to the concept of "official acts"—which played much the same role—and whether the two did not, in the end, amount to one and the same thing.

4. Second, as indicated by the jurisprudence and practice cited in the report, the situation was more straightforward than draft articles 2 and 5 seemed to suggest: a person who enjoyed immunity was any person through whom the State acted. Since immunity *ratione materiae* flowed from an act, it was the nature of the function performed by means of that act that mattered: ultimately, it was immunity *of the State* and not of the person. It thus followed logically that any person who acted as an agent or official of the State enjoyed immunity *ratione materiae*, thus obviating the need for any additional criterion. That was implicit in the United Nations Convention on Jurisdictional Immunities of States and Their Property, which included among those who enjoyed immunity "representatives of the State acting in that capacity", and also in numerous judgments and international instruments that defined the persons who enjoyed immunity *ratione materiae* as State officials or agents acting in that capacity, without further specification. One example was the judgment of the International Court of Justice in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)*, which seemed to use the terms "agents" and "organs" of the State synonymously. However, that did *not* mean that those officials or agents should enjoy or actually enjoyed absolute immunity, as everything depended on the *separate* question of whether the act carried out by the official or agent was itself covered by such immunity.

5. In light of those observations, he wished to make three proposals. First, with regard to the term to be used in the title of the draft articles, he agreed with the view that "organ" was not the most suitable. Given that, in its previous work, namely in the commentaries to the 2001 draft articles on responsibility of States for internationally wrongful acts,[190] the Commission had drawn a distinction between organs and agents, it would appear to be excluding the latter of the two categories if it selected the word "organ" for the present set of draft articles. And although, as the Commission had also had the occasion to indicate, individuals could be organs of the State and it was not out of the question to bring criminal proceedings against legal persons, in the majority of cases, immunity from criminal prosecution concerned natural persons, which meant that the term "organ" risked creating confusion. The term "officials", which appeared to be the appropriate term in English, would therefore be more appropriately rendered in French by the expression *tout représentant ou tout agent de l'État*, which included both administrative agents and political office holders. Second, the definition of persons who enjoyed immunity, which was indeed required, could be simplified by modelling it on the definition of agents contained in article 2 of the articles on the responsibility of international organizations,[191] so as to read: "State official means any person who is charged by the State with carrying out, or helping to carry out, one of its functions, and thus through whom the State acts."

6. That definition had several advantages: apart from the fact that it was easy to translate, it referred to "any

[190] General Assembly resolution 56/83 of 12 December 2001, annex. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

[191] See the draft articles on the responsibility of international organizations adopted by the Commission at its sixty-third session and the commentaries thereto in *Yearbook … 2011*, vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

person", without further qualification of the persons concerned; it used the neutral term "functions" instead of the controversial expression "elements of governmental authority"; it placed emphasis on the State, which, through its agent, was the primary beneficiary of immunity *ratione materiae*; and it covered the various categories of persons concerned.

7. Finally, he proposed that a corresponding amendment be made to draft article 5, using Sir Michael's proposal. Draft article 5 would then read: "State officials enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction".

8. Mr. PARK said that he supported the Special Rapporteur's approach, which started from the assumption that international law did not generally define the concept of "official" and examined national and international practice in order to develop criteria for identifying the persons who could be protected by immunity from foreign criminal jurisdiction. That approach was actually preferable to one that relied on a definition of the concept of "official". In paragraph 111, subparagraph (*a*), of her third report, based on her review of the practice, the Special Rapporteur concluded that the connection between the State official and the State could take several forms (constitutional, statutory or contractual) and that it could be either *de jure* or *de facto* in nature. That being the case, the expression "whatever position the person holds in the organization of the State", contained in draft article 2 (*e*) (ii), seemed to limit the concept of official or *de jure* official, and clarification of that point would therefore be welcome. It would also be useful to have clarification of the scope of the *de facto* connection: could the persons referred to in article 5 of the articles on responsibility of States for internationally wrongful acts—namely those that were not an organ of the State as defined in article 4 of that text, but who were empowered by the law of that State to exercise elements of the governmental authority—be considered *de facto* officials? And what of the persons referred to in article 8 of the same text, namely, those who acted on the instructions of, or under the direction or control of, the State?

9. With regard to the choice of terms, he agreed with the Special Rapporteur that the word *représentant* was not the most suitable. The word "organ" was not much better: it had already been used in the articles on responsibility of States for internationally wrongful acts to designate both natural persons and entities that acted on behalf of the State. In addition, as pointed out by Mr. Murphy and Mr. Forteau, the term was potentially confusing as it could give the false impression that the Commission's work dealt with the immunity of the State, whereas it dealt with the immunity from foreign criminal jurisdiction of natural persons who acted on behalf of, or in the name of, the State. Questions of terminology did not boil down to simply selecting a term, since none was able to meet the Commission's expectations fully. For that reason, he proposed to use the expression *fonctionnaire de l'État* in the French version, *funcionario* in the Spanish version and "official" in the English version, as well as to specify that, for the purposes of the draft articles, the meaning of those terms was independent of the one they might have under national law.

10. Turning to the proposed draft articles, he said that draft article 2 (*e*) (ii), which seemed to reproduce the broad outlines of article 1, paragraph 1, of the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, should be reformulated because it drew a problematic distinction between representing the State and exercising elements of governmental authority. In actuality, persons who held senior positions, and who were every bit as much civil servants [*fonctionnaires*] as their subordinates, were considered to represent the State, so that the fact of discharging such duties did not differ from the exercise of elements of governmental authority, but was instead derived from it. The expression "whatever position the person holds in the organization of the State" assumed that State officials were all civil servants [*fonctionnaires*], which was also problematic. Lastly, it might be necessary to proceed in the same manner as in article 4 of the articles on responsibility of States for internationally wrongful acts, by indicating that the word "official" referred to both officials of the central Government and those of territorial units. It would also be necessary to determine whether a person acting temporarily on behalf of the State enjoyed immunity from foreign criminal jurisdiction.

11. With regard to draft article 5, he took note of the Special Rapporteur's explanations in paragraph 150 of her third report, but was of the view that they should appear, not in the commentary, but in the draft article itself, which could be reformulated to read: "Former Heads of State, Heads of Government and Ministers for Foreign Affairs and the persons referred to in draft article 2 (*e*) (ii), who exercised elements of governmental authority enjoy immunity *ratione materiae*." Once it had completed its consideration of the question of acts performed in an official capacity, the Commission could add language to draft article 5 to indicate that officials other than those comprising the troika enjoyed immunity *ratione materiae* for acts they performed in an official capacity. Finally, he was of the view that a new draft article should be formulated in order to cover the temporal element of immunity *ratione materiae*. Like Mr. Tladi and Mr. Forteau, he believed that it was still premature to consider Mr. Murase's proposal, which raised complex questions. In conclusion, he was in favour of referring draft articles 2 and 5 to the Drafting Committee.

12. Mr. SABOIA said that, in the Special Rapporteur's analysis of the criteria to be used in identifying the persons who enjoyed immunity, she had relied, *inter alia*, on treaty practice, and particularly on "international treaties which define conduct that could constitute a crime, regardless of its connection with international relations". The study she had carried out on that subject was excellent and unquestionably useful, but it should be borne in mind that those treaties had different objects and purposes and operated in a specific context, owing to the fact that they defined and established penalties for serious international crimes or transnational crimes the repression of which required close cooperation among States. Such crimes could, of course, be committed by State officials or agents, but they were often perpetrated by individuals who had no official ties to the State, with the complicity of the State or at its instigation, precisely in an attempt to preclude the State's exposure to liability. Consequently, the criteria to be used in identifying organs or agents of the State must be broad

enough to include the categories of persons who, without being State officials or agents, nevertheless acted with the State's complicity or consent, or at its instigation.

13. As several members had recalled, immunity remained an exception and should be dealt with in a restrictive manner. The definition of State official for the purposes of immunity from foreign criminal jurisdiction must be based on distinct and stricter criteria than those of treaties relating to international crimes such as genocide, torture or corruption. Those treaties would be more suited to determining what constituted an "official act" and which acts could justify exceptions to the rule of immunity. In her analysis of treaties on diplomatic and consular relations, the Special Rapporteur provided useful examples of how immunity was dealt with in international law. Faced with the need to determine who, among the highest authorities, enjoyed immunity *ratione personae*, the Commission had opted for a restricted list. When it came to immunity *ratione materiae*, it must give preference to narrow criteria.

14. Consequently, it seemed difficult to include persons acting *de facto* as agents of the State, as did the Committee against Torture, or those working for a public-sector company or body in a foreign country, as indicated in paragraph 93 of the third report. If, for the reasons given and for their mutual benefit, two countries wished to grant such persons privileges or immunities, they could do so by means of a bilateral agreement. Similarly, although it was true that, for the purposes of establishing the responsibility of States for internationally wrongful acts, one could consider that even persons acting *de facto* as organs or agents could exercise such authority if, as indicated in paragraph 109 of the third report, they were "in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority", the same could not apply to immunity *ratione materiae* from foreign criminal jurisdiction, unless there was an *ad hoc* arrangement—for example, when a State hosted peace negotiations between another State and an insurgent group. For those reasons, he generally supported the criteria proposed in paragraph 111 of the third report for use in determining what constituted a State official for the purposes of the present topic, with the exception of the clarification made at the end of subparagraph (*a*) to the effect that the connection between the State official and the State could be *de jure* or *de facto*.

15. With regard to terminology, he was in favour of using the term "official" in English, even if it meant foregoing consistency with the other languages. It was true that the term, like its Spanish equivalent *funcionario,* was not suitable for referring to an elected member of the legislature or judiciary, but the nuances could be explicated in the commentary. He was also of the view that the growing tendency to ease the rules on exceptions to immunity in favour of the fight against impunity must be taken into account. Nevertheless, the Special Rapporteur's cautious approach to the matter should be followed and the whole issue, including the "without prejudice" clause proposed by Mr. Murase, must be considered in due course. In conclusion, he was in favour of referring the two draft articles proposed by the Special Rapporteur to the Drafting Committee.

16. Mr. CAFLISCH said that, in response to the question of which acts and which persons were immune from foreign criminal jurisdiction, it was necessary to find a definition that covered all criminally punishable acts committed by natural or legal persons in the name of, and on behalf of, the State. It was therefore a matter of including all types of acts performed in the name of, and on behalf of, the State, with the exception of those not committed within that very context, even if they were attributable to a civil servant [*fonctionnaire*], and with the exception of international crimes—an issue that would be dealt with in the near future. Included in that category were all acts attributable to a simple employee (and not a "civil servant" [*fonctionnaire*]), but also acts attributable to a private person or entity, for example, a private company based in Switzerland which, on a contractual basis, exercised governmental authority in another State. There was no doubt that drawing up a list of the persons and acts covered by immunity would be of little use, since all lists were, by definition, non-exhaustive. Consequently, and as the Special Rapporteur probably intended, an abstract definition that encompassed all acts not subject to foreign criminal jurisdiction *ratione materiae* had to be formulated. For that purpose, the wording of draft article 2 (*e*) (ii) seemed, at first glance, to be suitable. As to the choice of terms, he considered the word *fonctionnaire* [civil servant] to be unsuitable, as it referred exclusively to those persons whose connection to the State was by means of a specific status. As far as the term *employé* [employee] was concerned, although it was more widely used, it was ambiguous because it did not cover persons who, without being connected to the State by an employment contract, acted on behalf of the State. The word *organe* [organ] was no better suited, since, among the persons who acted on behalf of the State, there were persons and entities that were not organs of the State, within the meaning generally attributed to that term. It should nevertheless be pointed out that all persons or entities that fell within the scope of the topic acted on behalf of the State and that, consequently, at least some of them "represented" it, in the usual sense of the word. For that reason, he could support Mr. Forteau's proposal to utilize the expression *agents et/ou représentants de l'État* [State officials and/or agents] and he was not opposed to the use of the term "officials" in the English version, but he could under no circumstances accept that the term should be translated by *fonctionnaire*. There were many persons who acted on behalf of the State but who could not be referred to as a *fonctionnaire*, judges being one such example. Attention should also be drawn to the need to ensure that, by acting in the name of, and on behalf of, the State, the "official or agent" concerned was in strict compliance with his or her mandate, since it was only in those circumstances that he or she could enjoy immunity. In conclusion, he had no objection to referring the draft articles to the Drafting Committee.

17. Mr. KITTICHAISAREE recalled that delegates in the Sixth Committee had strongly emphasized that, as far as immunity was concerned, the Commission should clarify whether it was codifying customary international law or engaging in the progressive development of international law.

18. Mr. CANDIOTI said that it would be unwise to enter into that debate, because the topic under consideration was

already complex enough. In any event, the Commission's practice was not to make a clear distinction between the two aspects of its mandate, recognizing as it did that they were two aspects of one and the same function.

The meeting rose at 11.30 a.m.

3220th MEETING

Thursday, 10 July 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/666, Part II, sect. B, A/CN.4/673, A/CN.4/L.850)

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the third report of the Special Rapporteur on the topic of immunity of State officials from foreign criminal jurisdiction (A/CN.4/673).

2. Mr. KAMTO said that he endorsed the Special Rapporteur's observations in chapter II, section A, of her third report concerning the term "official". In paragraph 19, she stated that the term "official" (*représentant*) was not the most suitable term for referring to all categories of persons who were covered by immunity from foreign criminal jurisdiction. He was of a different view, however, and he disagreed with her preference for the term "organ".

3. The term "organ" could refer to an individual, a physical person, or to an entity, in which case it was difficult to speak of criminal responsibility. One should recall the Latin maxim: *societas delinquere non potest*. Even today, when criminal responsibility was envisaged for corporations, it was actually the responsibility of the senior managers that was invoked—at least when the criminal responsibility of the physical person entailed a custodial sentence—and not the responsibility of the corporation itself. Moreover, a reference to an "organ" in the present context risked blurring the distinction between the immunity of representatives of the State and the immunity of the State itself.

4. He did not favour any of the alternatives to the term "official" proposed by the Special Rapporteur. The terms *agent* or *fonctionnaire* in French were entirely unsuitable since, in many French-speaking countries of Africa, they referred to employees of the public administration whose status was governed by the national labour code; they would thus not encompass all the persons that the Commission intended to cover.

5. The proposal to use the combined term *représentants et agents de l'État* would raise more questions than it would resolve, since in many French-speaking countries, it was possible for a *représentant de l'État* not to be an *agent de l'État*, but an *agent de l'État* was always a *représentant de l'État*, in the broad sense of the word "representative", and not in the strict sense in which it referred to the members of the troika and other high-level State officials.

6. However, the term *représentant de l'État* was broad enough to cover the members of the troika, who already enjoyed immunity *ratione personae*, and other persons, whether they were agents of the State, *fonctionnaires* or even *ad hoc* representatives of the State. The determining element, and, in fact, the sole criterion for identifying persons who enjoyed immunity from foreign criminal jurisdiction, was whether the person had acted on behalf of and in the name of the State. Such an approach would obviate the need to subdivide subparagraph (*e*) into subordinate subparagraphs (i) and (ii) in order to make a distinction between the members of the troika and the other persons acting on behalf of and in the name of the State. At the same time, so long as the treatment of the topic depended on making a fundamental distinction between immunity *ratione personae* and immunity *ratione materiae*, the distinction between those who enjoyed the two kinds of immunity had to be reflected in the definition of the term "State official". Consequently, the current structure of draft article 2 (*e*) did not pose insurmountable problems for him, and he was in favour of referring draft article 2 to the Drafting Committee.

7. With regard to the identification of the persons who enjoyed immunity from foreign criminal jurisdiction, a distinction also had to be made between the members of the troika and other State officials. The same justification used to grant the members of the troika immunity *ratione personae*—to facilitate relations between States—remained valid for granting them immunity *ratione materiae*. However, the same could not be said of other State officials, whose immunity might depend on the nature of the criminal offence they had committed, and was thus relative, not complete. Any reference to complete immunity for the members of the troika was, of course, without prejudice to the regime of criminal responsibility before international criminal courts. As was clearly indicated in article 27, paragraph 2, of the Rome Statute of the International Criminal Court, article 7, paragraph 2, of the Statute of the International Tribunal for the Former Yugoslavia[192] and article 6, paragraph 2, of the Statute of the International Tribunal for Rwanda,[193]

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[192] Security Council resolution 827 (1993) of 25 May 1993 (see the report of the Secretary-General presented pursuant to paragraph 2 of Security Council resolution 808 (1993) (S/25704 and Corr.1 and Add.1, annex)).

[193] Security Council resolution 955 (1994) of 8 November 1994, annex.

the leaders of a State, whoever they might be, did not enjoy immunity before those courts. The crucial issue of impunity should be addressed on the basis of the following fundamental distinction: lack of immunity before an international criminal court did not necessarily entail lack of immunity from foreign criminal jurisdiction, and vice versa.

8. The third report did not raise the difficult question of whether all other State officials outside of the troika could be granted immunity from foreign criminal jurisdiction, which might be seen as implying that the Special Rapporteur considered that they could. The justification for such a rule under international law was debatable. To draw an analogy with the international criminal law regime, one could point out that the criminal jurisdiction of the international criminal courts and tribunals had thus far been limited only to the leaders and other senior officials of the State. He cited article 46A *bis* of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights as an example of the extension of immunity to "senior State officials" (*hauts fonctionnaires*). Should the regime on immunity from foreign criminal jurisdiction being developed by the Commission cover all State officials, or only certain ones? And if so, which ones? He suspected that the response could not be fully formulated before settling the question of the scope of immunity *ratione materiae*.

9. In its work on the draft code of crimes against the peace and security of mankind in 1951, the Commission had decided to restrict itself to crimes that included a political element or jeopardized the maintenance of international peace and security, expressly excluding such areas such as piracy, drug trafficking, trafficking in children and women, and slavery.[194] In its work in 1996 on the same subject,[195] the Commission had considered that the draft code should cover only the most serious international crimes. Yet the provisions of national legislation defined various offences that, while they fell outside the scope of immunity *ratione materiae,* could entail the prosecution of State officials before the criminal courts of the host State.

10. Those considerations led him to suggest a number of improvements to draft article 5. First, the distinction between the members of the troika and other State officials who enjoyed immunity *ratione materiae* should be reflected in the text. For that purpose, draft article 5 should become draft article 7, following draft articles 4, 5 and 6, which the Commission had considered in 2013.[196] Second, it should be understood that the formulation of the draft article was contingent upon the Special Rapporteur's proposals and the Commission's decision as to which criminal offences would be covered by immunity. With those suggestions, he was in favour of referring draft article 5 to the Drafting Committee.

11. Ms. JACOBSSON said she welcomed the fact that, in paragraph 15 of the third report, the Special Rapporteur stipulated that the three normative elements of immunity *ratione materiae* identified in paragraph 13 must not be read as a pronouncement on exceptions to such immunity or as recognition that immunity was absolute in nature.

12. As the Special Rapporteur correctly pointed out in paragraph 24 of her third report, there was no universally accepted definition of the term "official". National definitions reflected national legal and constitutional structures and were therefore not decisive in an international context. The Special Rapporteur's search for a term that corresponded to three criteria—position, functions to perform and representation—went beyond facilitating the work of domestic judges. It was aimed at achieving the universally consistent use of the underlying concept, irrespective of the language used. Nevertheless, she herself was not entirely convinced by the suggestion to abandon the term "official" and replace it with "organ". She feared that it would only cause confusion and would be premature until a better idea was gained of what could be agreed on in substance, particularly with respect to exceptions to immunity.

13. Turning to the draft articles, she said there was a very close connection between the wording of draft article 2 (*e*) (ii) and the definition of an act of a State in article 4, paragraph 1, of the articles on responsibility of States for internationally wrongful acts.[197] That was only to be expected. When a State claimed immunity for a State official who had committed a criminal act in which he or she had acted on behalf of the State, and the act was attributable to the State, then there was no doubt that the State was responsible for the act. That rule reflected the juxtaposition of immunity and impunity. The real challenge was to establish the connection with the State, which was not always apparent, as attested by a number of historical and contemporary examples. Given the possibility that States might attempt to avoid responsibility by disassociating themselves from those who were acting in their name or on their behalf, the list of persons who enjoyed immunity *ratione materiae* should be limited, not expanded.

14. The description of a State official provided in draft article 2 (*e*) (ii) was a good starting point, but its application across differing national constitutional and legal structures could result in inconsistencies, something that must be avoided. Another solution might be to refrain from defining the term "State official" altogether, given the lack of a definition at the international level; however, it would be difficult, if not impossible, to identify the exceptions to immunity without a clear idea of the categories of persons covered by the term "State official".

15. The wording of draft article 5 was somewhat confusing, since it seemed to imply that only State officials who exercised elements of governmental authority enjoyed immunity *ratione materiae*. Mr. Murase's suggestion to

[194] See *Yearbook … 1951*, vol. II, document A/1858, p. 134, para. 52 (*a*).

[195] The draft code adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.

[196] *Yearbook … 2013*, vol. II (Part Two), pp. 38–39, footnotes 234–236.

[197] General Assembly resolution 56/83 of 12 December 2001, annex. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

refrain from using the term "*ratione personae*" altogether was interesting and should be discussed in the Drafting Committee. She was in favour of referring the draft articles to the Drafting Committee.

16. Mr. WISNUMURTI said that it was unclear how to answer the questions of who enjoyed immunity *ratione materiae*, what types of acts were covered by such immunity and over what period of time such immunity could be invoked and applied, due to the lack of uniform practice in those areas. Consequently, he agreed with the Special Rapporteur's proposal to determine which persons would be covered by immunity *ratione materiae* only by applying "identifying criteria" on a case-by-case basis. In paragraph 111 of her third report, the Special Rapporteur proposed three criteria for identifying what constituted an official. In the first criterion, the element of connection with the State was important in establishing a valid link between the official and the act performed, on the one hand, and the State, on the other. However, the idea that the connection could be *de jure* or *de facto* would have the effect of broadening the notion of "connection with the State". In the second criterion, it was unnecessary to state that the official acted "internationally", as it was sufficiently clear that he or she acted as a representative of the State, irrespective of where or in what context the act was committed. The notion of performing official functions was different from that of acting as a representative of the State and should therefore constitute a separate criterion. In the third criterion, the phrase "exercises elements of governmental authority" and the final sentence were superfluous.

17. He agreed with the Special Rapporteur that the criteria for identifying the meaning of "official" should apply to those State officials who enjoyed immunity *ratione personae* as well as to those who enjoyed immunity *ratione materiae*. He also agreed that, in order to identify a person as an official, it must be determined on a case-by-case basis whether all the criteria had been met. In his view, the use of the term "organ" to designate the persons who enjoyed immunity would cause problems of interpretation and misunderstanding and would be inconsistent with State practice, in which the term "official" was widely accepted. Despite certain linguistic weaknesses inherent in the term "official", he firmly believed that the Commission should retain it in the title of the topic as well as in the content of the draft articles.

18. With regard to draft article 2 (*e*), he agreed with the Special Rapporteur that the definition of State official should include the members of the troika and any other person who enjoyed immunity *ratione materiae*. He likewise agreed with Sir Michael that subparagraph (*e*) (ii) needed to be simplified. As it currently stood, it was an amalgam of overlapping elements that led to confusion and could pose difficulties for authorities charged with interpreting the definition.

19. As to draft article 5, he agreed with Mr. Park's observation that, as currently worded, it excluded the members of the troika, who also enjoyed immunity *ratione materiae*. He was of the opinion that the phrase "State officials who exercise elements of governmental authority" excluded the other elements of the criteria for identifying an official who enjoyed immunity *ratione materiae*. The text should therefore be reformulated.

20. With those comments and suggestions, he supported referring the two draft articles to the Drafting Committee.

21. Mr. HASSOUNA commended the Special Rapporteur on the excellent analysis contained in her well-researched third report.

22. She had relied to a significant extent on the contents of treaties in order to define "State official". Immunities under treaties had thus been used, carefully and successfully, to define immunities that did not stem from treaties. On the other hand, the link between the attribution of conduct of public officials to a State in the context of State responsibility and the definition of "State officials" in the context of immunity was unclear. The Special Rapporteur might wish to specify the situations in which the rules of attribution set forth in the articles on responsibility of States for internationally wrongful acts could be used to delimit the scope of the definition of State officials who enjoyed immunity from criminal jurisdiction. A provision to that effect might read: "When a State asserts immunity for a government official entitled to immunity *ratione materiae* for acts that are *ultra vires* or otherwise private, that conduct is adopted by the State and the State is responsible under international law for the wrongful act." That language was consistent with that of the judgment of the International Court of Justice in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)*.

23. It would also be helpful to clarify to what extent officials of federal entities who represented the Government of their entity abroad should be entitled to immunity from criminal prosecution for acts performed in the exercise of their functions. It should be made plain that the definition of "State officials" was not confined to central Government officials when agents of federal entities exercised elements of State authority.

24. The distinction drawn in draft article 2 (*e*) (i) and (ii) was inadvisable, since it seemed to suggest that the members of the troika constituted a discrete class of State official, whereas for the purpose of defining "State official", they were merely examples of officials who were also covered by the general definition contained in subparagraph (ii). If, however, the Special Rapporteur were to deem it necessary to deal with the troika in a separate clause, then diplomatic agents, another category of State official, should also be mentioned in a separate clause. The draft articles should differentiate between diplomatic agents, who were explicitly protected under customary international law so that a State might send representatives abroad for the conduct of international relations, and other government officials.

25. The definition proposed in subparagraph (ii) appeared to match the identifying criteria listed in paragraph 111 of the third report, but more attention should be paid to the wording. The relationship between acting "on behalf" of a State and "in the name" of a State should be made clear in order to ensure that persons acting "on behalf of", but perhaps not "in the name of" the State,

were not excluded from the application of the definition. Similarly, the alternative of either representing the State or exercising elements of governmental authority suggested that the exercise of governmental authority did not include an element of representation. Since the concept of governmental authority was not defined in the third report, despite its importance, it would be wise to include in the commentary some examples of persons exercising such authority, or at least a definition of the term, and to explain that it did not imply a representative of the executive branch of Government. A more precise formulation would be "State authority". He was in favour of simplifying subparagraph (ii) to read "any other person who acts on behalf of the State enjoys immunity *ratione materiae*".

26. The statement in draft article 5 that "State officials who exercise elements of governmental authority benefit from immunity *ratione materiae* in regard to the exercise of foreign criminal jurisdiction" was questionable, since it could be taken to imply that State officials who exercised governmental authority constituted a distinct or separate category, which was not the case. For that reason, it should be deleted.

27. He commended the Special Rapporteur on her in-depth analysis of the complex terminological issues raised by the topic. The suggestion that the term "official" be replaced with "organ" was problematic, however, because the latter term could also refer to sets of persons, services or institutions acting on behalf of the State, whereas the topic concerned the individual criminal responsibility of persons acting on behalf of the State. Moreover, it was not certain that the word "organ" could be used in that context in Arabic, Chinese and Russian. A definition of a State official based on easily comprehensible terms could be provided by making it plain that a person's title and position in the organization of a State were not decisive when determining whether they came within the definition of "State official". Lastly, the term "State official" offered the advantage of referring to individuals and of being suitable for use in a broad sense, enabling it to be applied to all categories of persons covered by immunity from criminal jurisdiction.

28. He agreed with the referral of the two draft articles to the Drafting Committee.

29. Mr. FORTEAU, referring to the assertion by Mr. Kamto and Mr. Hassouna that legal entities could not bear criminal responsibility, said that it was not entirely true. In France, for example, the courts had recognized the immunity *ratione materiae* of legal persons in criminal proceedings. In the *Erika* case, the Criminal Chamber of the *Cour de cassation* had found, in a decision of 23 November 2004, that the Malta Maritime Authority, which was a Government agency, enjoyed immunity *ratione materiae*. Legal persons could therefore not be excluded from the scope of the subject. A phrase along the lines of "State representatives and agents" (*représentants et agents de l'État*) would cover that kind of entity. The commentary could then supply the requisite clarifications.

30. Mr. KAMTO said it was difficult to see how a criminal penalty could be imposed on a company, other than by sentencing its senior management. The criminal responsibility of a legal person rested on attribution, because the senior management assumed responsibility for a crime committed by the company. The execution of a sentence against a legal person took the pecuniary form, because a legal person could not be imprisoned.

31. Mr. FORTEAU said that, under article 121-2 of the French Criminal Code,[198] legal persons could bear criminal responsibility, independently of the responsibility of their senior management or subdivisions. Punitive damages and administrative penalties could be imposed on companies.

32. Mr. SABOIA agreed with Mr. Forteau. In Brazil, a number of companies had been ordered to pay hefty fines for crimes against the environment. He did not rule out the possibility that, in the future, legal persons and even the State might incur criminal liability for serious international crimes.

33. Mr. PETRIČ commended the Special Rapporteur on her extensively researched third report. It dealt exclusively with the question of who enjoyed immunity *ratione materiae*, the Commission having decided the previous year that only the troika was entitled to immunity *ratione personae*.[199] He personally still held that, in accordance with the realities and needs of modern international relations, immunity *ratione personae* should be extended to other high-ranking State officials who represented the State in international relations, and not limited to the troika.

34. Like many earlier speakers, he would prefer to retain the term "State official" in the English version of the draft articles. "Organ" and "agent" were less apt, as immunity was granted to a natural person or individual, whereas the word "organ" also encompassed collective State organs and legal persons.

35. Since the topic was confined to immunity from foreign criminal jurisdiction, and as standards differed widely in civil as opposed to criminal procedure, it would not be appropriate for the Commission to study cases concerning immunity in civil disputes before national courts. He agreed with Mr. Murphy's comments in that respect.

36. The fact that immunity basically involved a relationship between States, not between a State and an individual, raised several questions. A State could claim immunity in another State for somebody not listed among their State officials, or for somebody not corresponding to the parameters of the definition which the Commission might adopt, provided that this person had acted under the State's orders or instructions. It was up to the other State to accept or reject that claim, even if the person in question was regarded as a State official by the first State. In the contemporary world, the fact that public–private partnerships had taken over many functions previously performed by States made it even more difficult to establish a list of State officials or a general definition. He was not sure that it was even useful to try to establish such a definition or list. The key issue in the context of immunity *ratione materiae* was

[198] Available from www.legifrance.gouv.fr, in French under *Les codes en vigueur* and some English translations under *Traductions*.

[199] See *Yearbook … 2013*, vol. II (Part Two), pp. 39 *et seq.*, paras. 48–49, draft articles 3 and 4 and the commentaries thereto.

whether an act of an individual was an act of a State, in other words whether the individual had acted on behalf of the State. Immunity *ratione materiae* did not derive from the status of the person involved; the State had to prove that the individual had acted on its behalf as its official, agent or especially authorized person.

37. Both draft articles proposed in the third report should be referred to the Drafting Committee, which should simplify them.

38. Mr. SABOIA, referring to Mr. Petrič's comment that the issue of immunity *ratione materiae* intrinsically implied a relationship between States and that it was sufficient for a State to claim that a person was acting on its behalf for that person to enjoy that immunity, said he wished to know whether, if a State claimed that a terrorist or a spy had acted on its behalf, the other State had to accept that claim and grant immunity.

39. Sir Michael WOOD drew attention to the *Khurts Bat* case where an English court had followed the argument of the counsel of the Foreign and Commonwealth Office that the accused, who was to be extradited to Germany to face prosecution for offences similar to torture, on behalf of Mongolia, would not enjoy immunity in the territorial State, Germany.

40. Mr. PETRIČ said that his point had been that it was doubtful whether the Commission would be able to devise a satisfactory definition of "State official", and if it did, it might subsequently discover that it had established some dubious limitations. It would be better to answer the question who should be entitled to immunity *ratione materiae* by determining the acts that could be attributed to the State.

41. Mr. NOLTE congratulated the Special Rapporteur on the meticulous research underpinning her third report. He agreed that any consideration of the official acts that would trigger immunity *ratione materiae* and of exceptions thereto should be left to a later stage of the Commission's deliberations. The terminological difficulties in French could be resolved by Mr. Forteau's suggestion to translate the term "official" into French as *représentants et agents*. He doubted whether it was appropriate to transpose the definition of "agent" contained in draft article 2 of the articles on responsibility of international organizations,[200] which had been developed with the specific needs of international organizations in mind, to the sphere of States. While he also agreed that the Commission should not adopt the term "organ" instead of "official", that term should not be explicitly excluded, as it was in the aforementioned article 2. The phrase "other person or entity", also in article 2, was problematic, since someone other than an official should not be defined as an official. The Commission should not attempt to deal with the immunity of legal persons from foreign criminal jurisdiction, as that would only add further complications to an already difficult topic.

[200] See the draft articles on the responsibility of international organizations adopted by the Commission at its sixty-third session and the commentaries thereto in *Yearbook … 2011,* vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

42. He concurred with Mr. Forteau and Mr. Tladi that "official" should be defined in such as way as to leave room for the notion of "official act" to serve an independent purpose. It was, however, questionable whether defining "official" more broadly than what was encompassed by "official acts" would serve any practical purpose. The term *agent* in the French text had the advantage of signalling that the person concerned did not necessarily have to have the formal status of a State official. He echoed the doubts expressed concerning the distinction drawn between individuals who had a "relationship" with the State and those who acted on its behalf, as the latter necessarily implied the former. He also questioned the inclusion in draft article 2 of the qualification that State officials acted not only "on behalf of" but also "in the name of" the State. Was the implication that all such persons must always announce that they acted for the State? Was the phrase "and represents the State or exercises elements of governmental authority" intended to limit the definition to those who exercised a specific form of public authority? Did it exclude those who worked for a legally separate public entity or otherwise could not claim to represent the State as such? In his view, references to the nature of the function exercised and the position held in the organization of the State had a place in the commentary but should not be included in the definition itself, as they made it unclear.

43. In paragraph 147 of her third report, the Special Rapporteur had used professors as examples of persons who had formal connections with the State but were nonetheless not assigned to functions involving the exercise of governmental authority. In Germany, professors were considered to be acting on behalf of the State, and even exercising governmental authority, when they performed tasks such as grading final exam papers, which involved issuing administrative acts that could be challenged in court. It was doubtful whether professors should be entitled to immunity from foreign criminal jurisdiction, however. The example served to demonstrate that the Commission should consider whether there should be a lower threshold for persons who acted on behalf of the State. It was not a question of drawing a distinction between low-level and high-level officials—police officers, for instance, were low-level officials but doubtless enjoyed immunity *ratione materiae*—rather, it was a matter of identifying those officials who, in acting on behalf of the State, did not perform functions that were typical for the State.

44. The Special Rapporteur had set herself a very ambitious agenda for her next report. The question of what was an "official act" and the issue of possible exceptions to immunity would each require more study and debate than the definition of "State official".

45. Mr. ŠTURMA, praising the Special Rapporteur's third report, welcomed the identification, in paragraph 13 thereof, of three characteristics for the scope of immunity: subjective, material and temporal. However important it might be to define which persons enjoyed immunity *ratione materiae*, the key element was the definition of official acts, because immunity *ratione materiae* was functional in nature, relating to the exercise of governmental authority rather than to the persons who exercised it. The

Special Rapporteur would surely deal with the kinds of official acts covered by such immunity—which differed from private acts and crimes under international law, neither of which should benefit from immunity—in due course.

46. With regard to terminology, he agreed with those who favoured the English term "official" over "organ", as immunity from foreign criminal jurisdiction was enjoyed by natural persons, rather than entities. The problem was not purely linguistic: seemingly similar terms could carry different connotations in different languages, reflecting differences in States' civil service systems. An "official" of one State might not have the same status in another State. Moreover, as the Special Rapporteur had pointed out, the definition must be broad enough to include not only officials in the State administration, but also persons exercising legislative or judicial functions. The various connotations arising from domestic law should pose no obstacle, however, as any definition would be adopted in the context of international law.

47. As to how broad the definition of "official" should be, he agreed with the three conclusions in paragraph 111 of the third report. However, he did not think that all of the criteria included therein needed to appear in the definition of a State official in draft article 2 (*e*), as official acts would be defined separately. Mr. Forteau's proposal, inspired by article 2 (*d*) of the articles on the responsibility of international organizations, had certain merits. It would be broad enough to include the situations covered by articles 4 and 5 of the articles on responsibility of States for internationally wrongful acts and might encompass those envisaged in article 9. However, the definition of an official should not cover conduct of private individuals acknowledged and adopted by a State as its own (art. 11) or conduct of a group of persons, such as paramilitaries, directed or controlled by a State (art. 8), as that could be taken as an invitation to abuse of immunity. The definition itself should be brief and simple, with other considerations reflected in the commentary.

48. Turning to draft article 5, he echoed the proposals to delete the words "who exercise elements of governmental authority", which seemed to refer to the nature of acts, rather than to the persons who enjoyed immunity. Alternatively, reference could be made to the exercise of official acts, although that would introduce the material and temporal scope of immunity. The Special Rapporteur had stated her intention to cover those aspects in her third report and he fully supported that approach.

49. In conclusion, he recommended that all the draft articles be referred to the Drafting Committee.

50. Mr. KITTICHAISAREE commended the Special Rapporteur on her well-researched third report. He expressed full support for her conclusion that it was impossible to list all those who might be classified as officials for the purposes of immunity *ratione materiae* and that identifying criteria were therefore needed, and should be applied on a case-by-case basis. He concurred with those who had suggested that "official", rather than "organ", was the most appropriate English term.

51. Endorsing the characteristics of immunity *ratione materiae* set out in paragraph 12 of the Special Rapporteur's third report, he said that attributing a person's conduct to a State in order to impute to that State responsibility for an internationally wrongful act was quite different from identifying the persons who enjoyed immunity. The former was firmly grounded in the law of tortious or delictual liability, covering many types of person and entities, while the scope of immunity *ratione materiae* was more limited. Not all the persons referred to in chapter II of the articles on responsibility of States for internationally wrongful acts were "officials" who enjoyed such immunity.

52. An official who enjoyed immunity *ratione materiae* must hold a position in the organization of the State. There was no sound legal basis or policy justification to extend the scope of that immunity to non-officials, such as private contractors, who were not in a position to exercise inherently governmental authority. In some jurisdictions, such as the United States, private contractors were barred from activities that were inherently governmental in nature and therefore could not fall within the scope of persons acting in the name and on behalf of the State and exercising authority as defined in draft article 2 (*e*) (ii) of the third report.

53. Draft article 2 (*e*) (ii) was well crafted but might need some textual amendment. He agreed with those who had suggested that the phrase "or exercises elements of governmental authority" would cover unusual cases such as that of the Supreme Leader of the Islamic Republic of Iran, who was the *de jure* and *de facto* Head of State in the Islamic Republic of Iran.

54. It was essential to address the relationship between immunity *ratione personae* and immunity *ratione materiae* and to consider whether the latter restricted or extended the scope of the former. While he did not support the suggestion that the term *ratione materiae* not be used, clarification was certainly needed. The possibility that draft article 5 might be taken to exclude persons from enjoying both forms of immunity should be discussed further. It was also to be hoped that the Special Rapporteur's next report would cover acts performed *ultra vires*.

55. The issue of possible exceptions to immunity was likely to prove controversial, and he hoped that the Commission would be able to find sufficient evidence to substantiate any exceptions proposed. Any exception to immunity must not jeopardize the immunity of Heads of State with purely ceremonial roles and no *de facto* authority over acts or omissions that might constitute core crimes proscribed by international law and with respect to which no immunity was permitted. International law must also recognize the immunity granted by the domestic law of a State to its Government officials for acts undertaken in good faith to maintain law and order but without any specific intent to commit human rights violations.

56. Expressing support for the drafting proposal made by Mr. Park in order to extend immunity *ratione materiae* to former members of the troika, and taking account of the suggestion made by Mr. Murphy, he suggested that draft article 5 be amended to read:

"*Draft article 5. Persons enjoying immunity* ratione materiae

"State officials who exercised elements of governmental authority enjoy immunity *ratione materiae* from foreign criminal jurisdiction."

57. Mr. HUANG, observing that the fundamental divisions of principle among the members of the Commission on the topic seemed to be narrowing, expressed concern that the approach being followed continued to focus too much on progressive development and not enough on codification, despite the agreement reached at the previous session. Disputes concerning the relationship between immunity and impunity were connected to that problem. The Commission should focus on codification rather than progressive development, with a view to achieving consensus on what was a complicated and sensitive subject and producing articles that would enjoy wide recognition and application.

58. There was no intrinsic link between immunity and impunity. Immunity from foreign criminal jurisdiction was not intended to absolve officials of their substantive responsibilities; rather, it was a neutral, procedural mechanism. Tackling impunity required political measures, such as those mentioned in the *Arrest Warrant of 11 April 2000* case.

59. Immunity of State officials was closely related to the immunity and responsibility of States. In that context, particular attention should be paid to the Commission's previous discussions on the responsibility of States for internationally wrongful acts. Articles 4 and 5 of the articles on responsibility of States for internationally wrongful acts gave a basis for determining who was an official for the purposes of immunity *ratione materiae*, and the Special Rapporteur had formulated logical criteria in that regard in paragraph 111 of her third report, with which he agreed. In specific cases, more weight should be given to domestic law in determining who counted as an official, as legislation and practice differed widely among States. That said, the definition of an official should not be expanded so far as to include private contractors, for example.

60. The distinction between immunity *ratione materiae* and immunity *ratione personae* should be applied to specific aspects of the topic such as the subjective, material and temporal scope of immunity. Immunity *ratione materiae* stemmed from the principle of the sovereign equality of States and could therefore be considered an extension of State immunity. Denying the possibility of immunity *ratione materiae* would be to deny State immunity, which was unacceptable. High-level officials needed to enjoy immunity in order to discharge their duties effectively. Removing that immunity would constitute serious interference in a country's internal affairs, undermining friendly relations among States and jeopardizing democracy and stability. The fundamental nature of immunity must be preserved, with only a few exceptions for situations in which they were genuinely warranted.

61. The focus on terminology in the Special Rapporteur's third report reflected the particular importance of defining "official" for the purposes of the topic, from the perspective of both immunity *ratione materiae* and immunity *ratione personae*. In the former context, the definition would need to focus on the functions fulfilled, while in the latter, the term would need to designate specific holders of public office who represented the State. In selecting the most appropriate terms, the nature of the office held by a person enjoying immunity must be known, and domestic and international judicial practices must be taken into account. In English, the term "State official" seemed appropriate. The term "organ", suggested by the Special Rapporteur, most commonly referred to entities. In addition to English, French and Spanish, consideration should be given to terminology in the Commission's other three working languages so as to ensure consistency. Using "organ" to refer to individuals would cause problems of translation in Chinese, for instance.

62. Given the importance of the topic, the Commission should strive to complete its work within the current quinquennium. He expressed support for the suggestion to transmit draft article 5, as formulated by the Special Rapporteur, to the Drafting Committee.

The meeting rose at 12.55 p.m.

3221st MEETING

Thursday, 10 July 2014, at 3 p.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Huang, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/666, Part II, sect. B, A/CN.4/673, A/CN.4/L.850)

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the third report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/673).

2. Mr. VÁZQUEZ-BERMÚDEZ said that, as the Special Rapporteur had pointed out, the three normative elements of the immunity *ratione materiae* of State officials from foreign criminal jurisdiction, namely the subjective, material and temporal scopes, should be considered together in order to define the legal regime for that type of immunity.

3. With regard to terminology, in particular the search for a term that could be used interchangeably in the various language versions to refer to all persons to whom immunity might apply, he said that the Special Rapporteur's proposal to employ the term "organ" rather than "official" was problematic. According to article 4 of the articles on responsibility of States for internationally wrongful acts,[201] the term "State organ" included both persons and entities. However, the present topic concerned only natural persons, not legal persons or entities. Furthermore, in the domestic legislation of various States, the term "organ" was always employed to refer to State entities and not to natural persons having a connection with the State. A case in point was the Constitution of the Republic of Ecuador.

4. He agreed with other members of the Commission that the English word "official" appeared to cover adequately all the various categories of persons who might enjoy immunity from foreign criminal jurisdiction, whereas the ordinary meaning of the Spanish word *funcionario* was more limited in scope. The suggestion made during the debate to use the dual terms *representante* and *agente* as equivalents of the English term "official" did not seem to him to be the most appropriate solution, because the word *agente* was restrictive in the domestic law of various States, whereas its use in the articles on responsibility of States for internationally wrongful acts covered both natural persons and entities. Similarly, the term *representante del Estado* was potentially restrictive and might be interpreted as referring mainly to the so-called "troika" of Head of State, Head of Government and Minister for Foreign Affairs.

5. As to the elements that identified State officials, the Special Rapporteur had stated that the first of the identifying criteria was the person's connection with the State. With regard to immunity *ratione personae*, that connection was clear in the case of the troika; the Commission had concluded that, under international law, members of the troika enjoyed that type of immunity simply by virtue of their office, with no need for specific powers to be granted by the State.[202] With respect to the subjective scope of immunity *ratione materiae*, those persons to whom immunity might apply in a specific case also had to have a connection with the State, meaning that they were in a position to perform acts that involved the exercise of governmental authority.

6. That said, for the purposes of the draft articles, State officials did not enjoy immunity *ratione materiae* simply by virtue of being officials and in a position to exercise governmental authority. Another normative element of immunity *ratione materiae* also had to apply, for example, the requirement that the act with respect to which immunity was invoked had been performed in an official, and not a private, capacity.

7. As to draft article 2 (*e*), the definition of "State official" should cover both the troika and any other persons acting on behalf of the State. However, in his view, there was no need for the subparagraph to be divided into two separate clauses.

8. Referring to draft article 5 regarding immunity *ratione materiae*, he said that, there again, a person's status as a State official did not entail automatic enjoyment of that type of immunity. Rather, the enjoyment of immunity *ratione materiae* depended in each specific case on a combination of all the normative elements. Accordingly, such categorical wording as that contained in draft article 5 did not seem appropriate, given that State officials entitled to exercise governmental authority were in fact persons only potentially entitled to enjoy immunity *ratione materiae*, rather than persons who actually enjoyed that immunity.

9. The various issues raised during the debate concerning the two draft articles could be dealt with by the Drafting Committee. He was therefore in favour of their referral to the Committee.

10. Mr. SINGH said that he agreed with the Special Rapporteur's conclusion that the topic should cover all individuals who acted on the behalf of the State, regardless of their official position, and all individuals who might enjoy immunity *ratione materiae* with respect to certain acts. However, he questioned whether it was in fact necessary, or even helpful, to attempt to specify a category or categories of persons who might enjoy immunity *ratione materiae*. He agreed with other members that if the Commission were to focus on the acts with respect to which immunity might arise—namely acts performed not in a private capacity, but on behalf of the State—rather than on the person concerned, then it would be unnecessary to define a category or categories of persons who enjoyed immunity *ratione materiae*. Persons might enjoy immunity when acting on behalf of the State, irrespective of who they were and of the position they might or might not hold. They did not need to be *fonctionnaires*, "officials" or "civil servants", however those terms might be defined in domestic law. Furthermore, as the Special Rapporteur had pointed out, the terms were not defined in general international law.

11. He did not agree with the Special Rapporteur's view that a definition of the concept of official was essential for the topic, or with her conclusion that persons covered by immunity *ratione materiae* could be determined only by using identifying criteria. In his opinion, attention should be given to the act performed rather than the status of the person performing it. Such a position was in fact supported by the Special Rapporteur's conclusion in paragraph 38 of her third report that, as a general rule, national courts did not set out criteria for identifying a person as an "official".

12. As to the Special Rapporteur's assertion in paragraph 54 of her third report that certain elements in the Vienna Convention on Diplomatic Relations made it possible to identify State officials, it was unclear how that special regime, which covered persons with a special relationship with the State, would be of help in defining the meaning of "State official" for other purposes.

13. In various places in the third report, the Special Rapporteur had emphasized two separate criteria for

[201] General Assembly resolution 56/83 of 12 December 2001, annex, article 4. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

[202] See *Yearbook … 2013*, vol. II (Part Two), p. 43 (para. (2) of the commentary to draft article 3).

identifying persons who might enjoy immunity, namely a connection with the State and the fact that they were acting on behalf of the State. However, it was sufficient to demonstrate that the acts were done on behalf of the State, and no other connection with the State needed to be shown, although such a connection might constitute a factual element to assist in determining whether the acts had been done on behalf of the State.

14. As to the Special Rapporteur's proposal to replace the term "official" with the word "organ", he agreed with other members of the Commission that such a change of terminology was unnecessary.

15. Regarding draft article 2 on the definition of "State official", he agreed with those members who had stated that subparagraph (*e*) (ii) should be greatly simplified. It currently contained a series of qualifiers of doubtful relevance and could be interpreted as excluding acts that were not done as part of any official function but which were nevertheless done on behalf of the State. He also agreed that the current wording was unduly restrictive with regard to the persons who enjoyed immunity *ratione materiae*.

16. As to draft article 5, he said that limiting the persons who enjoyed immunity *ratione materiae* to officials who exercised elements of governmental authority blurred the distinction between the persons who might enjoy such immunity and the acts with respect to which immunity was enjoyed. He agreed with the view that draft article 5 should be modelled on draft article 3 and read: "State officials enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction."

17. He supported referral of the two draft articles to the Drafting Committee.

18. Mr. KAMTO said that he agreed with Mr. Vázquez-Bermúdez that legal persons should not be included among those persons that enjoyed immunity *ratione materiae*, since that would inevitably give rise to intractable problems, and there was currently an insufficient basis in international law for such a position. Unfortunately, however, that view was not shared by all members. He agreed with Mr. Singh that due account should be taken of the act with respect to which immunity might arise, but there should nevertheless be some element demonstrating that the person had performed the act in the name or on behalf of the State in question.

19. Mr. CANDIOTI said that he shared Mr. Kamto's concerns and thought that it should be made clear in the definition of terms that "State official" referred to a natural person or individual. The issue of the immunity of legal persons could be dealt with under the topic of the jurisdictional immunity of international organizations, which was currently on the Commission's long-term programme of work.[203] Likewise, the current topic did not cover immunity for individuals employed by private companies contracted by a State to perform certain functions, such as security operations.

[203] See *Yearbook … 2006*, vol. II (Part Two), p. 19, para. 22; and *Yearbook … 2011*, vol. II (Part Two), pp. 175–176, para. 369.

20. Mr. FORTEAU said that it might be useful to consider article 58 of the articles on the responsibility of States for internationally wrongful acts, which said that the text was without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.

21. The CHAIRPERSON, speaking as a member of the Commission, said that he endorsed the Special Rapporteur's approach of addressing immunity *ratione materiae* through a consideration of three key questions, namely who enjoyed immunity, what types of acts were covered and what the period of time was over which immunity could be invoked.

22. Paragraph 14 of the third report provided an answer to the last of those questions when it stated that there was broad consensus on the unlimited nature of the temporal scope of immunity *ratione materiae*. However, that important element was not reflected in the set of draft articles proposed by the Special Rapporteur. One might assume that the absence of a reference in that regard could be taken to mean that immunity was unlimited in its duration. Nonetheless, he would prefer an express reference to be made thereto in a future draft article.

23. Turning to the definition of the persons that enjoyed immunity, he said that he supported the Special Rapporteur's general conclusion that immunity should cover all persons who were, in the words of the Appeals Chamber of the International Tribunal for the Former Yugoslavia in *Prosecutor* v. *Blaškić*, "mere instruments of a State" (para. 38 of the decision). However, the question facing the Commission was how that very important conclusion could be turned into a specific definition to be eventually included in the draft articles. The Special Rapporteur had carried out a wide-ranging survey of factual material, and had also analysed the terminology involved. However, it seemed to him that the factual material was of greater relevance to defining an official act than to defining the persons covered by immunity. If, as had been proposed in the third report, the definition of an official were to be based on the definition of an official act, then it would be redundant and unnecessary. Accordingly, some members had proposed abstaining from defining the concept of an official. While he understood that viewpoint, he thought that at the current stage it would be worthwhile for the Commission to seek a definition that would be of use for later work on the topic and, more importantly, for the subsequent application of any rules that were developed.

24. As noted in paragraph 24 of the third report, the concept of an "official" had not been defined in international law, because each country's legal system had its own definition. The judgment in the *Prosecutor* v. *Blaškić* case was significant in that context, since it referred to the freedom of the State under customary international law to determine its internal structure and to designate the individuals acting as its agents or organs. Any definition prepared at the international level should not curtail that freedom.

25. The judgment also referred to the right of each State to claim that acts or transactions performed by one of its organs in its official capacity should be attributed to

the State, so that the individual organ might not be held accountable for those acts or transactions. In other words, it stressed the fact that immunity belonged to the State. In his opinion, those two elements had a direct bearing on the definition of an official. For example, it would be possible to define an official as a person designated by the State to be its agent or organ in accordance with internal law and confirmed as such by that State. What was important about such a definition was the distinction made between persons covered by immunity and acts or situations that gave rise to the enjoyment of immunity.

26. In the context of the application of privileges and immunities, notifications regarding the status of a person were of particular importance. For example, in the 1946 Convention on the Privileges and Immunities of the United Nations, the question of defining officials was resolved in quite a simple manner. Article V, section 17, of the Convention provided: "The Secretary-General will specify the categories of officials to which the provisions of this Article and Article VII shall apply. … The names of the officials shall from time to time be made known to the Governments of Members." While such a procedure could not be applied in the present context, it would be useful to include in the definition of an official the procedural element involving the confirmation by the State of the relevant status of a person.

27. Even though he was of the opinion that all individuals through whom the State acted should enjoy immunity *ratione materiae,* at the same time, for the purposes of the present draft articles, it would be useful to distinguish between officials in the narrow understanding of the word, namely persons who were part of the structure of the State, and persons who were agents of the State in the broad understanding of that term. That could be achieved by defining an "official" and an "agent" separately in the draft articles. The definition of an agent could be similar to that contained in the articles on the responsibility of international organizations,[204] with the key element being "charged by" the State "with carrying out one of its functions and thus through whom" the State acts. Defining "official" and "agent" separately would have the merit of highlighting the connection between the official and his or her office. It would also permit the subsequent inclusion in the definition of the procedural difference between applying immunity to officials of a State *stricto sensu* and to agents of a State. Clearly, confirming the official status of a person holding office in a State structure was a relatively simple matter, which automatically created the presumption that the person had or enjoyed immunity. As far as agents of the State were concerned, the procedure would be somewhat different, since establishing their connection with a State was a bit more complicated.

28. Turning to draft article 5, he said that he agreed with the main idea but thought that further work was needed on the formulation, since the words "governmental authority" and "benefit" were inappropriate in that context.

29. In conclusion, he supported referral of the draft articles to the Drafting Committee.

The meeting rose at 3.55 p.m.

3222nd MEETING

Friday, 11 July 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/666, Part II, sect. B, A/CN.4/673, A/CN.4/L.850)

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the Special Rapporteur on the topic of immunity of State officials from foreign criminal jurisdiction to summarize the debate on her third report.

2. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) recalled that, in her previous report, she had examined each of the three normative elements (who, what, when) of immunity *ratione personae*[205] and had therefore done the same for immunity *ratione materiae*. That approach had been well received. While most members had agreed that it was necessary to define the persons who enjoyed immunity, not only generally, but also specifically in relation to immunity *ratione materiae,* some members had not seen the need to define that form of immunity, as it depended on the act rather than the person. That was true, and even those in favour of dealing separately with subjective scope had agreed with the relevance of the act itself, which in that context was much more important than when determining immunity *ratione personae*. However, that did not imply that the act superseded the actor, particularly since, as had been stressed on numerous occasions, immunity from foreign criminal jurisdiction applied specifically to persons. The only difficulty that might arise would be in determining which normative element, the act or the person, carried more weight, but that would also be true of immunity *ratione personae*. For that reason, it appeared necessary to define the concept

[204] See the draft articles on the responsibility of international organizations adopted by the Commission at its sixty-third session and the commentaries thereto in *Yearbook … 2011,* vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

[205] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/661, chap. V.

of "State official" with respect to immunity *ratione materiae*. That notion had prompted many questions, especially with regard to immunity *ratione materiae*: for example, whether immunity applied to *de facto* State representatives, whether it was reserved for State officials or likewise extended to the representatives of federal or local entities or the employees of public or private bodies serving the State, or if it might even be applied to legal persons. All those questions provided confirmation—if any were needed—that the definition of "State officials" depended on the type of immunity.

3. The majority of members had supported the method proposed by the Special Rapporteur for determining the common criteria applying to all persons potentially enjoying immunity, be it *ratione personae* or *ratione materiae*. However, some members had not been convinced of the relevance in that regard of case law related to immunity from civil jurisdiction. Apart from the fact that it had already been referred to by the previous Special Rapporteur, Mr. Kolodkin, and in the Secretariat's study,[206] as well as in the commentary to draft article 3 provisionally adopted by the Commission at its previous session,[207] in the current report, such case law had been used only to illustrate national practice in relation to persons enjoying immunity and no conclusions had been drawn from it. However, as had been suggested by one member who had cited practice in the United States of America, it might be useful to differentiate between the criteria for immunity from civil jurisdiction and those for immunity from criminal jurisdiction, since other courts and tribunals, both national and international, could sometimes draw a similar distinction, as the European Court of Human Rights had done in the case *Jones and Others* v. *the United Kingdom*. Other members had disagreed with the reference to international treaties establishing special regimes, which were expressly excluded from the topic under consideration. Again, it was necessary to remember that treaty practice had already been used in the past and was now being used solely to identify the distinctive criteria of State officials, without drawing any further consequences. However, as a number of members had rightly emphasized, some of those instruments had very different objects and purposes, such as combating corruption, and they defined the concept of State officials in such a way as to encompass as many criminally answerable persons as possible, whereas immunity from jurisdiction should be interpreted narrowly. With regard to the Commission's previous work, some members were of the view that only the draft articles on responsibility of States for internationally wrongful acts[208] were relevant, while others believed that it was risky to transpose those concepts to immunity. She considered that they and the draft code of crimes against the peace and security of mankind[209] were all useful.

4. The question had been raised of whether the persons enjoying immunity *ratione materiae* should be listed. It would certainly be helpful to give examples, particularly in the commentary, but drawing up a list of the persons concerned might lead to confusion, particularly since such a list would necessarily have to be non-exhaustive in order to duly reflect the variety of practice. Furthermore, it could not take account of any changes in positions and functions over time. For those very reasons, the Commission had decided not to draft such lists in the past.

5. With regard to the definition of "State official", several members had considered that too many criteria had been proposed and that the expression "on behalf and in the name of" was redundant. The distinction between the function of representing the State and the exercise of elements of governmental authority had not seemed clear. The different expressions were intended to establish that the person concerned had a link with the State and to highlight the public nature of the person's activity, without associating the nature of the acts (what) with the status as an official (who). In other words, it was a matter of showing that the person in question was in a position to carry out acts that involved the exercise of governmental authority—or of sovereignty—by virtue of their link to a State that acted through them. Certain members, however, had felt that the current formulation of the proposed draft articles was a mixture of subjective and material elements; it would therefore be for the Drafting Committee to review that section, taking account in particular of the proposals made by Mr. Forteau and Mr. Murphy.

6. Some members had wished to know whether all officials, including the representatives of federated or local entities, as well as the employees of public or private bodies acting in the name and on behalf of the State, enjoyed immunity *ratione materiae*, and whether their hierarchical position had any bearing in that regard. They had also wished to know whether *de facto* representatives and legal persons were covered by that type of immunity. In responding to those questions, it was essential to be cautious and to avoid too broad an interpretation of the rules related to immunity, which was simply a limitation on the exercise of judicial competence by the forum State. The criteria mentioned in the third report should therefore be interpreted as narrowly as possible, bearing in mind the fact that immunity was granted to the official in the interest of the State, in order to protect its sovereign prerogatives. In that context, there were not enough elements to be found in practice to be able to speak of immunity of legal persons in general, and furthermore, it would be dangerous to recognize, expressly and generally, the immunity of *de facto* representatives, particularly those who did not have an official link to the State, or who had not been entrusted with a clear role. It therefore seemed impossible to include among State officials the categories of persons covered by article 8 of the draft articles on responsibility of States for internationally wrongful acts, as one member had proposed. Another issue was whether persons who were not part of the administrative structure, but to whom the State had given a specific task at some time, could be considered *de facto* representatives and enjoy immunity on those grounds. She personally believed that, given the ultimate purpose of immunity, it would be going too far to consider a person whose conduct could be attributed to the State to be a representative of that State.

[206] Document A/CN.4/596 and Corr.1, mimeographed; available from the Commission's website, documents of the sixtieth session (2008). The final text will be reproduced in an addendum to *Yearbook … 2008*, vol. II (Part One).

[207] *Yearbook … 2013*, vol. II (Part Two), pp. 43–47 (commentary to draft article 3).

[208] General Assembly resolution 56/83 of 12 December 2001, annex. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

[209] *Yearbook … 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.

7. As indicated in paragraph 149 of the third report, hierarchical status was not in itself a sufficient basis for concluding that a person was a State official, although it should certainly been taken into account to specify the type of link between the State and the official. However, if the Commission opted for a restrictive approach to immunity, the argument put forward by Mr. Tladi with regard to representatives acting on the orders of the State should be retained. In any case, the recognition of a representative's status did not always go hand in hand with the recognition of immunity, which depended on the nature of the acts carried out, as would be seen in the next report. It should also be remembered that the notion of "official" was defined in the third report only for the purposes of the draft articles and solely on the basis of international law. The definitions of that notion adopted at the national level applied only at the domestic level—a logical consequence of the principle of sovereign equality of States. In order to preserve the autonomy of existing State rights and treaty rights, a "without prejudice" clause could perhaps be inserted into the draft articles to the effect that the definition of "official" was provided for the purposes of the draft articles.

8. As to the choice of terms, she was grateful that the majority of members had been in favour of maintaining the term "State official" in the English version, since it met the requisite conditions for designating the persons covered by immunity from foreign criminal jurisdiction. On the other hand, she could not accept most of the arguments put forward by those who considered the term "organ" to be inappropriate, as it appeared in a number of instruments where it designated both physical and legal persons, and it had already been used by the Commission. Although some very real, substantial problems might arise through the use of different, non-interchangeable terms, she would not insist on "organ" being retained as the only term. The most practical solution would be to choose a term in each language rather than using the same term in all language versions; in that respect, Mr. Forteau's proposal for the French version was welcome. In any case, semantic problems related to the use of different terms would be mitigated thanks to the adoption of definitions and the commentaries, where attention would be drawn to the various terms used and to the meaning of each one for the purpose of the draft articles.

9. She proposed sending draft articles 2 and 5 to the Drafting Committee for consideration in light of the comments made by the members during the debate. The notion of "official" could be defined in a single paragraph in draft article 2, and subparagraph (ii) could be simplified without deleting the reference to the Head of State, the Head of Government and the Minister for Foreign Affairs, who clearly differed from other officials who might enjoy immunity from foreign criminal jurisdiction. With regard to draft article 5, the comments made by certain members concerning the proposal to delete the phrase "who exercise … governmental authority" were interesting. However, in her view, when defining the subjective scope of immunity *ratione materiae*, it was not enough to use the term "official" without further clarification, as it did not sufficiently highlight the highly functional dimension of that type of immunity. That issue would be considered in further depth by the Drafting Committee, as would the question of the time period to be used so that the members of the troika would not be deprived of immunity *ratione materiae* for acts they had carried out in an official capacity while in office, which would be contrary to the intended objective. However, she was not convinced that it was necessary to expressly mention the members of the troika in that draft article, as that would simply further complicate the relationship between immunity *ratione materiae* and immunity *ratione personae* and could be misleading.

10. The responses from States to the questionnaire on acts carried out in an official capacity,[210] which had been forwarded to them during the previous session, would be taken into consideration in the fourth report. She believed that the relationship between immunity *ratione personae* and immunity *ratione materiae*, which had been examined during the previous session, was described in enough detail in the commentary to draft article 4 (Scope of immunity *ratione personae*),[211] as it mentioned the temporal aspect. In order to properly define that relationship, it was also vital to take into account the material scope of immunity *ratione personae* and immunity *ratione materiae*, even though both types of immunity could, in different circumstances and according to different rules, apply to the same category of subjects, namely the Head of State, the Head of Government and the Minister for Foreign Affairs. However, it seemed difficult to conclude that the relationship between the two types of immunity could be governed by the principle of *lex specialis* strictly speaking. Lastly, while she understood the reasons behind the proposal to amend draft article 1, she noted that the draft article had already been provisionally adopted by the Commission and that it would not be appropriate to reconsider it at that stage.

Organization of the work of the session (*continued*)*

[Agenda item 1]

11. The list of members of the Drafting Committee on the topic of immunity of State officials from foreign criminal jurisdiction was read out: Mr. Candioti, Mr. Forteau, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Murphy, Mr. Park, Mr. Petrič, Mr. Saboia (Chairperson), Mr. Singh, Mr. Šturma, Mr. Vázquez-Bermúdez, Mr. Wako, Sir Michael Wood and Mr. Tladi (*ex officio*).

Identification of customary international law[212] (A/CN.4/666, Part II, sect. D, A/CN.4/672[213])

[Agenda item 9]

Second report of the Special Rapporteur

12. The CHAIRPERSON invited the Special Rapporteur to introduce his second report on the identification of customary international law (A/CN.4/672).

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* Resumed from the 3218th meeting.

[210] See *Yearbook … 2013*, vol. II (Part Two), p. 15, para. 25.

[211] *Ibid*., pp. 47–50.

[212] At its sixty-fifth session (2013), the Commission considered the first report of the Special Rapporteur (*Yearbook … 2013*, vol. II (Part One), document A/CN.4/663) and had before it the Secretariat memorandum on the topic (*ibid.*, document A/CN.4/659). At that session, the Commission decided to change the title of the topic from "Formation and evidence of customary international law" to "Identification of customary international law" (*ibid*., vol. II (Part Two), p. 64, para. 65).

[213] Reproduced in *Yearbook … 2014*, vol. II (Part One).

13. Sir Michael WOOD (Special Rapporteur) pointed out that a considerable number of errors had been introduced into the text of the second report that had been published by the United Nations. These mainly related to the footnotes and made them quite difficult to follow in places. He hoped that a corrected version would appear in due course.

14. The Special Rapporteur said that his second report, which covered a good deal of ground, did not focus solely on State practice, as had been his original intention, because it had become clear during the preparation of the report that it was difficult to consider that topic in isolation from *opinio juris*. With regard to the history of the topic outlined in the introduction of the second report, it should be recalled that, in 2013, most members of the Commission had been of the view that *jus cogens* should not be dealt with as part of the present topic. However, although the identification of customary law and *jus cogens* had to be considered separately, the two issues were nonetheless complementary and he therefore welcomed the fact that the Commission was moving towards the inclusion of the latter topic in its long-term programme of work so that the two could be considered in parallel. His third report would contain an analysis of "special" or "regional" customary law, the importance of which had been stressed in the Sixth Committee in 2013.

15. With regard to chapter I of the second report, it seemed that both the Commission and States in the Sixth Committee were broadly supportive of the proposal that the outcome should take the form of draft "conclusions". However, that did not preclude the possibility of later replacing that term with "guidelines", for instance, if it seemed more appropriate. Paragraph 1 of draft conclusion 1 (Scope) provided a useful definition of the objective of the draft conclusions, by indicating that they were concerned solely with methodology and not with the substance of the rules of customary law. The content of the second paragraph, however, could just as well be included in the commentary or even in an introductory "general commentary" to the draft conclusions.

16. With regard to draft conclusion 2 (Use of terms) in chapter II of the report, it might in fact be rather awkward to propose a definition of customary international law "[f]or the purposes of the present draft conclusions", as though the expression might have a different meaning for other purposes, which was most definitely not the case. It would therefore be more appropriate to place the content of subparagraph (*a*) in an introductory general commentary; subparagraph (*b*) might then be unnecessary.

17. Chapter III of the second report dealt with the basic approach to the identification of customary international law, namely that of the two constituent elements, mentioned in draft conclusion 3 (Basic approach). That approach was well established and applied to all fields of international law, although there might be differences in application depending on the field or types of rules in question. He would therefore be interested to hear the views of the Commission members on that issue. Draft conclusion 4 (Assessment of evidence) stressed the importance of taking account of the context surrounding the evidence of the two elements of customary law.

18. Chapter IV of the second report concerned the first of the two elements—general practice. In draft conclusion 5 (Role of practice), the expression "general practice" had been chosen in preference to "State practice" because, given the role that other actors, in particular certain international organizations, might play, it seemed preferable to use the language of Article 38, paragraph 1 (*b*), of the Statute of the International Court of Justice, especially since that expression incorporated the basic requirement of generality. He invited the members of the Commission to share with him their views on the role of non-State actors' practice. That draft conclusion had also been largely inspired by the ruling of the International Court of Justice in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*. Draft conclusion 6 (Attribution of conduct) was based on the corresponding provision in the draft articles on responsibility of States for internationally wrongful acts.[214]

19. The difficulties related to the evidence of practice and acceptance required particular attention. He intended to explore that issue further in his third report; in the meantime, he invited the members of the Commission to comment on that point. With regard to manifestations of practice, the subject of draft conclusion 7 (Forms of practice), the Commission should consider the issue of whether to take into account verbal actions by States, which were mentioned in paragraph 1. Furthermore, given that the draft conclusions were aimed not just at specialists in international law, the list of possible manifestations of practice by States proposed in paragraph 2, which was necessarily non-exhaustive, was genuinely useful. Many of the types of practices listed could also serve as evidence of *opinio juris*. The essential issues of practice in connection with treaties and with the resolutions of international organizations would be covered in more depth in the third report. For that reason, he would welcome the Commission members' opinions on that subject. The importance of inaction should not be overlooked, and the practice of international organizations should be assessed with the same caution as was used when assessing State practice.

20. Draft conclusion 8 (Weighing evidence of practice) stated that there was no predetermined hierarchy among the various forms of practice—in other words, the practice of a State, which should be considered as a whole, was weighed in accordance with the specific circumstances of each case, or on the basis of the rule in question. The requirement set by draft conclusion 9 (Practice must be general and consistent) was crucial and derived from international case law.

21. Chapter V of the second report was devoted to the second element of customary law, namely its subjective element, which in fact raised more theoretical than practical difficulties. In draft conclusion 10 (Role of acceptance as law), the phrase "accepted as law" had been chosen in preference to other expressions, particularly *opinio juris (sive necessitates)*, given the intentions that

[214] General Assembly resolution 56/83 of 12 December 2001, annex, article 4. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

might be implied by its use and the difficulties raised by the definition of that term. In addition, "accepted as law" more closely described the beliefs that motivated States and took account of the forward-looking dimension. It was useful to read draft conclusion 11 (Evidence of acceptance as law) in conjunction with draft conclusion 7, as paragraphs 1, 2 and 3 of the former had parallels with those of the latter. Paragraph 4 reflected the idea that evidence of the acceptance of a practice as law could arise from the practice itself or could be deduced from it. Nonetheless, the element of acceptance was a separate requirement from practice itself, and should be established in each case. The Commission might prefer to reflect that idea, which necessitated further study, in a separate draft conclusion placed close to draft conclusion 3.

22. He proposed referring the draft conclusions to the Drafting Committee for provisional adoption during the current session. He would submit the related commentaries at the following session. The draft conclusions proposed in the second and third reports could be adopted at that session and thus be included in the report of the Commission to the General Assembly for 2015.

The meeting rose at 12.15 p.m.

3223rd MEETING

Tuesday, 15 July 2014, at 10 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Cooperation with other bodies (*continued*)*

[Agenda item 14]

STATEMENT BY THE REPRESENTATIVE OF THE INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRPERSON welcomed Mr. Novak Talavera, Vice-Chairperson of the Inter-American Juridical Committee (IAJC), and invited him to address the Commission.

2. Mr. NOVAK TALAVERA (Inter-American Juridical Committee) said that the Inter-American Juridical Committee was the advisory body of the Organization of American States (OAS) on international juridical matters; it undertook studies of that subject, either at the request of the OAS General Assembly or on its own initiative. In 2013, it had held two regular sessions, had completed five reports and had begun work on four issues of concern in the American hemisphere.[215]

3. The first report, on sexual orientation, gender identity and expression, surveyed progress in the protection afforded to the right to non-discrimination on grounds of sexual orientation and identity by the domestic legislation of American countries. It analysed the rulings of courts in some member States and identified inter-American instruments that might be of use in protecting the aforementioned right, as well as the latest precedents of the Inter-American Court of Human Rights that promoted non-discrimination on grounds of sexual identity.

4. The second report, on protection of cultural property in the event of armed conflict, contained model legislation to assist member States in implementing the standards and principles of international humanitarian law. The text comprised 12 chapters covering, *inter alia*, marking, identifying and cataloguing cultural property; planning of emergency measures; and monitoring and compliance mechanisms. The main objective was to persuade American States to adopt a nexus of preventive measures in peacetime in order to protect and preserve the region's cultural heritage in the event of armed conflict.

5. The third report, on inter-American judicial cooperation, had been prompted by threats to the region's security from trafficking in persons and drugs, terrorism, arms smuggling and organized crime. The report advocated a set of measures to harmonize procedures and legislation, enhance cooperation among the relevant authorities, promote capacity-building and remove obstacles to efficient intraregional judicial cooperation.

6. The fourth report concerned the drafting of guidelines on corporate social responsibility in the area of human rights and the environment in the Americas. It took account of the work done by several international organizations and of the particular features of the region. It reflected legislative progress and improvements in company practice in safeguarding human rights and the environment. It also pinpointed shortcomings and difficulties that had led the Inter-American Court of Human Rights to advocate for closer oversight by States of the activities of companies operating in their territory.

7. The fifth report, entitled "General guidelines for border integration", comprised more than 50 standards designed to facilitate agreements on cross-border cooperation and integration that drew on examples of best practice in the Americas and elsewhere and encompassed follow-up mechanisms.

8. In the second half of 2013, the IAJC had commenced work on a number of other matters of particular importance in the Americas. In devising guidelines for

* Resumed from the 3218th meeting.

[215] See the Annual Report of the Inter-American Juridical Committee to the forty-fourth regular session of the General Assembly of the Organization of American States (OAS/Ser.G - CP/doc.4956/14), available from the OAS website: www.oas.org/en/sla/iajc/docs/INFOANUAL.CJI.2013.ENG.pdf.

cross-border migratory management, its aim was to inform OAS member States about best practices in border checks, combining the protection of State security with scrupulous respect for non-residents' and migrants' human rights. The purpose of the work being undertaken on the jurisdictional immunities of States was to discover whether member States' current judicial practice was consistent with the standards and principles of international law, above all those embodied in the United Nations Convention on Jurisdictional Immunities of States and Their Property. The report resulting from the work on regulation of the use of narcotics and psychotropic substances sought to determine not only the compatibility of domestic legislation with international law, including the various drug control conventions of the United Nations, but also the position of individual member States on the consumption of "soft" drugs. The purpose of drawing up a report on electronic warehouse receipts for agricultural products was to formulate a set of principles and to draft a model law in order to establish a system enabling farmers to store some of their seeds between harvests and use the warehouse receipt as security for loans.

9. The IAJC had held meetings and exchanged information with the African Union Commission on International Law. In 2013, it had held its fortieth course on international law, which had been taught by some of the most distinguished experts in that field.

10. Mr. VÁZQUEZ-BERMÚDEZ wished to know in what way the IAJC guidelines concerning corporate social responsibility in the Americas had been of additional value with regard to other international instruments, such as the Guiding Principles on Business and Human Rights endorsed by the Human Rights Council in 2011.[216] Perhaps the IAJC could make a useful contribution to the forthcoming deliberations of the Working Group on the issue of human rights and transnational corporations and other business enterprises.

11. Mr. NOVAK TALAVERA (Inter-American Juridical Committee) said that the main contribution made by the IAJC report on corporate responsibility in the area of human rights and the environment was that it filled a gap. Although some countries of the Americas had accepted the guiding principles laid down by the United Nations, no guidelines specifically addressed the situation in that part of the world. The report had focused on a preventive approach to some of the worst problems caused by the disconnect between corporate social responsibility and corporate culture, and on making companies aware of what corporate social responsibility really meant. It had also emphasized oversight, because there was little supervision in most countries of the region and, as a result, national and foreign companies alike had been able to engage in activities with scant respect for the environment or human rights. For that reason, the Guidelines might prove useful to the above-mentioned Working Group.

12. Mr. KITTICHAISAREE wished to know the position in inter-American practice with regard to the statute of limitations in cases of enforced disappearance. When the Inter-American Court of Human Rights deliberated, did it apply local or universal customary law?

13. Mr. NOVAK TALAVERA (Inter-American Juridical Committee) said that the Inter-American Court of Human Rights was mandated to safeguard the rights set forth in the American Convention on Human Rights: "Pact of San José, Costa Rica" and in some other inter-American instruments that protected human rights. In interpreting and defining the true scope of those rights, it did not confine itself to the contents of the Convention, but took account of general international law. In the Court's findings, it was common to find references to general legal principles. The Court deemed enforced disappearance to be a continuous crime that started as soon as a person disappeared and continued until his or her fate was known. That principle was embodied in inter-American case law.

14. Mr. PETER said that, in some parts of the world, corporate social responsibility appeared to be synonymous with plundering in tons and giving back in ounces, in other words, companies enjoyed substantial tax exemptions but did little in return for the communities where they operated. Was that also the experience of the American region? Had the IAJC been able to identify any best practices, including through its interaction with the African region?

15. Mr. NOVAK TALAVERA (Inter-American Juridical Committee) said the Committee's first, very interesting meeting with the African Union Commission on International Law the previous year had shown that, while the African and American regions shared some common problems, practices and realities varied widely.

16. Some businesses in the Americas confused corporate social responsibility with simply building a few public works, whereas it entailed a commitment to, or long-term relationship with, the host community. Some, but not all, companies in the region behaved responsibly, took care of the environment and respected workers' rights and human rights. The main problem lay not with big companies, but with small and medium-sized enterprises, because they had fewer financial resources and therefore claimed that they were less able to include social responsibility in their corporate strategy. The IAJC took the view, however, that all companies could assume corporate social responsibility in keeping with their own scale. Work on the subject was progressing well.

17. One of the main concerns of the IAJC when drawing up the relevant guidelines had been to strike a balance between those members who wanted to bind companies using strong provisions and those who favoured greater flexibility. While foreign investment was beneficial because it generated jobs and wealth, at the same time, companies had to respect human rights and the environment. He believed that this balance had been achieved.

18. Ms. ESCOBAR HERNÁNDEZ asked whether the IAJC intended to draft a regional legal instrument on the jurisdictional immunities of States. If it had no such intention, did it consider that the United Nations Convention on Jurisdictional Immunities of States and Their Property

[216] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (A/HRC/17/31), annex. See also Human Rights Council resolution 17/4 of 16 June 2011, para. 1.

reflected the essence of the jurisdictional immunity of States in current international law? She wished to know if the IAJC had had any opportunity to study the practice of the civil and criminal courts of the American region with respect to the immunity of State officials from foreign criminal jurisdiction. It might be useful for the IAJC and the Commission to exchange information on the subject.

19. With reference to the theme of access to public information and protection of personal data, she asked how the Committee's consideration of access to public information by individuals was progressing. She was eager to learn what the general thrust of the work was and whether it was confined to specific aspects of the topic.

20. Mr. NOVAK TALAVERA (Inter-American Juridical Committee) said that the IAJC did not intend to draft a regional convention on the jurisdictional immunities of States, in view of the existence of the United Nations instrument just mentioned. The IAJC initiative had been prompted by the fact that practice at the inter-American level diverged widely and was even contradictory. As no regional study of the topic had ever been conducted, it appeared vital to compile information on the current practice of national courts with respect to the jurisdictional immunity of States, how that immunity was defined and what limits were placed on it. The IAJC was currently analysing the replies to a questionnaire which it had sent to ministries for foreign affairs. It had also drafted a guide on the protection of personal data.

21. Mr. PARK asked whether any divergences of opinion had surfaced within the IAJC during its discussion of the report on sexual orientation, gender identity and expression, or whether it had easily arrived at consensus. Did attitudes to the subject in the Americas differ from those held in Europe and Asia?

22. Mr. NOVAK TALAVERA (Inter-American Juridical Committee) said that Europe was much more advanced than his region in discussing sexual orientation and gender identity. Still, various domestic and international forums in the Americas were tackling those issues. At first, the subject had proved difficult to discuss within the IAJC, mainly for technical reasons such as terminology, rather than principled objections. The subject was certainly a sensitive one within the region, but overall the clear objectives of the IAJC had been to ensure that everyone enjoyed the same legal protection and to prevent discrimination.

23. Mr. HASSOUNA, welcoming the cooperation begun between the Inter-American Juridical Committee and the African Union Commission on International Law, asked whether cooperation was planned with bodies from other regions, and whether closer political cooperation among regions would affect cooperation on legal matters.

24. The IAJC work on immigration touched on the issue of expulsion of aliens. He asked whether the Committee had made use of the principles formulated by the Commission in that regard,[217] to what extent it followed the Commission's work, and whether it coordinated its position with that of the Commission.

25. Mr. NOVAK TALAVERA (Inter-American Juridical Committee) said that the IAJC was open to the work of other, similar bodies, from which it could doubtless benefit; however, budgetary constraints inevitably hampered cooperation. Solutions were sought wherever possible, for instance by organizing exchange visits and joint activities. Both the IAJC and its individual members closely followed the work of the Commission, a body that had forged a path through a wide range of topics in international law and whose reports were highly appreciated. The IAJC tried to maintain a position consistent with that of the Commission.

26. Mr. SABOIA expressed concern that, despite some progress, many acts of discrimination, some of them extremely serious, were committed on grounds of sexual orientation and gender identity in the region of the Americas.

27. He asked to what extent inter-American judicial cooperation mirrored processes under the United Nations Convention against Transnational Organized Crime and whether the IAJC had considered issues such as corruption, money laundering, slavery and child labour.

28. The Commission's work on the expulsion of aliens had focused on the rights of refugees and internally displaced persons. It had emerged that the region of the Americas took a much more favourable stance than others, thanks to the Cartagena Declaration on Refugees, which had been adopted by the OAS,[218] and he asked whether the IAJC planned to draft a convention on the rights of refugees.

29. Mr. NOVAK TALAVERA (Inter-American Juridical Committee) said that high rates of hate crime based on sexual orientation or gender identity, including violence and even murder, were a reality in much of the Americas. Most worryingly, rates appeared to be rising. Tackling the problem would be a complex task, as discrimination was not confined to any one field, and the lives and physical integrity of victims were at stake. Those factors had prompted the IAJC to begin work on the issue.

30. With regard to inter-American judicial cooperation, one of the aims of the IAJC was to prepare recommendations to facilitate cooperation in the various areas that Mr. Saboia had mentioned, and others, such as illicit drug trafficking and trafficking in persons, which were a serious problem in the Americas and elsewhere. Cooperation among police and security forces already seemed to function effectively, but more could be done at judicial level.

31. With regard to a possible regional convention on the rights of refugees and internally displaced persons, he said that the IAJC had not taken up the matter and had no plans to do so at present.

[217] See the draft articles on the expulsion of aliens adopted by the Commission on first reading, *Yearbook … 2012,* vol. II (Part Two), p. 15 *et seq.*, paras. 45–46.

[218] Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19 to 22 November 1984; available from: www.acnur.org/cartagena30/en, *Documents*.

32. Mr. VALENCIA-OSPINA said that, despite rising rates of discrimination based on sexual orientation and gender identity throughout the Americas, the work of the IAJC on the topic enjoyed significant political support, as reflected in judicial and legislative developments in a number of countries, including his own.

33. Various countries and groups in the Americas had expressed dissatisfaction both with regional judicial and arbitration bodies and with international courts and tribunals, leading to the idea of establishing an inter-American court to perform some of the functions currently ascribed to the International Court of Justice. He asked whether the IAJC had discussed the matter and whether the Americas had seen a change in attitude to universal jurisdiction in judicial and arbitral matters.

34. Mr. NOVAK TALAVERA (Inter-American Juridical Committee) said that the IAJC had considered the possibility of creating a regional court of justice some years previously, but for various reasons had reached a majority view not to pursue the matter. The budgetary and resource constraints involved would have been difficult to overcome, as the experience of the Inter-American Court of Human Rights had shown. Overall, despite their drawbacks, the International Court of Justice and other existing international tribunals were considered sufficient to enable countries to settle their disputes without recourse to force, even if rulings that went against a country's interests sometimes generated domestic discontent.

Identification of customary international law (*continued*) (A/CN.4/666, Part II, sect. D, A/CN.4/672)

[Agenda item 9]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

35. The CHAIRPERSON invited the Commission to resume its consideration of the second report of the Special Rapporteur on the identification of customary international law (A/CN.4/672).

36. Mr. PARK suggested that Parts One and Two of the proposed draft conclusions be merged, as draft conclusions 1 to 3 could all be considered introductory material; draft conclusion 4 could be incorporated later in the text. He expressed support in principle for the "two-element" approach to determining the existence and content of rules of customary international law, particularly in view of the well-reasoned analysis presented in the second report.

37. Although the definition of "international organization" proposed in draft conclusion 2 was clear, he doubted its necessity. The term "intergovernmental organization" could be used instead. If a more specific definition was needed, he suggested adopting the one used in the articles on the responsibility of international organizations.[219] He also suggested moving the definitions of "general practice", currently in draft conclusion 5, and "accepted as law (*opinio juris*)", now in draft conclusion 10, to draft conclusion 2, to form new subparagraphs (*c*) and (*d*), respectively, so as to define the basic substance of the two-element approach at the outset. Given that the terms "State practice", "practice of international organizations" and "*opinio juris*" were used more frequently than "general practice" and "accepted as law", it would be helpful to present both sets of terms in parallel. "General practice" was understood to include both State practice and the practice of international organizations.

38. Although he supported the two-element approach, he pointed out that no reference was made to the relationship between the two elements. In particular, the temporal relationship between them was not covered. In some cases, it was possible for rules of customary international law to be supported only by *opinio juris* until practice became fully established, as had occurred in the formation of the general principles of the law on outer space. Although general practice generally preceded *opinio juris*, a different tendency could be seen in some areas of international law, especially where technological developments or the emerging needs of developing countries were concerned. He therefore proposed a new draft conclusion, to read:

> "General practice (State practice) generally precedes acceptance as law (*opinio juris*). However, acceptance as law (*opinio juris*) may, in some instances, exceptionally precede general practice (State practice)."

39. He urged caution in drawing generalizations from judgments of the International Court of Justice and similar bodies, as they dealt only with concrete cases brought by particular parties to a dispute. There had been no international cases under the law on outer space to date, for example, and it would therefore be inappropriate to rely on judgments of international courts in that sphere.

40. The approach taken in draft conclusion 4, while unquestionably reasonable, was also very general and somewhat vague as practical guidance. It seemed unnecessary to devote an entire draft conclusion to such a general statement, especially when draft conclusions 8 and 11 dealt with similar matters. He therefore suggested that draft conclusion 4 be incorporated into draft conclusions 8 and 11. He further suggested that draft conclusion 5 make explicit reference to the fact that the practice of international organizations could in some cases constitute general practice, even though that was stated later, in draft conclusion 7.

41. Draft conclusion 6 dealt with attribution of conduct, but a question arose concerning attribution of a non-State actor's conduct to a State. In paragraph 34 of his second report, the Special Rapporteur suggested, apparently on the basis of the articles on responsibility of States for internationally wrongful acts,[220] that the conduct of *de facto* organs of a State might count as State practice. According to article 9 on responsibility of States for internationally wrongful acts, which governed cases when the

[219] See the draft articles on the responsibility of international organizations adopted by the Commission at its sixty-third session and the commentaries thereto in *Yearbook … 2011*, vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

[220] General Assembly resolution 56/83 of 12 December 2001, annex. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

State had not exerted any influence on the conduct of a non-State actor, such conduct did not have to be acknowledged by the State in order to be considered an act of the State under international law. It was doubtful, however, whether rules like that, which had been adopted for purposes of State responsibility, could be applied to determining that a non-State actor's conduct was State practice for the purposes of identifying customary international law. He therefore recommended that the issue of conduct attributable to a State in the context of State practice be examined carefully and discussed in the commentary to draft conclusion 6.

42. Draft conclusion 7, paragraph 2, simply listed various manifestations of State practice. He proposed that a more systematic approach be adopted, with the different examples classified under two headings, namely internal practice and external practice. He further proposed that the same approach be adopted with regard to draft conclusion 11, paragraph 2. He agreed with the Special Rapporteur's view, set out in paragraph 45 of his second report, that even though individuals and NGOs could play important roles in the observance of international law, their actions could not be considered to constitute practice for the purposes of the present topic.

43. Turning to draft conclusion 7, paragraphs 3 and 4, he said that while it was correct that inaction might serve as practice when absence of protest or of response to another State's unilateral action constituted acquiescence, the relationship between action and inaction in the context of the identification of practice needed further study. In particular, three questions needed to be addressed. First, what was the minimum level of inaction required for it to play a meaningful role in the formation of customary international law? Second, were a small number of actions sufficient to constitute customary international law when they were accompanied by numerous instances of inaction? Third, what happened in the event of inaction by some States while others acted as persistent objectors to unilateral actions by third States? His comment also applied to draft conclusion 11, paragraphs 3 and 4.

44. With regard to draft conclusion 7, paragraph 4, some concerns arose about the inclusion, in the list of possible forms of practice, of acts of international organizations, including resolutions. States often voted for or against a particular resolution as a result of political bargaining rather than out of legal conviction, and it was not always easy to discern a State's underlying intentions or motives, an element that was crucial in determining *opinio juris*. Furthermore, the legal value of United Nations resolutions varied greatly, depending on the type of resolution involved and the circumstances in which it was put to the vote. Care should be taken not to accord undue weight to the acts of international organizations. Accordingly, he proposed that references to resolutions and acts of international organizations be deleted in draft conclusion 7 and that the issue be dealt with separately from State practice.

45. With regard to draft conclusion 9 on the need for practice to be general and consistent, he said that it was unclear what the impact of persistent objectors was on the fulfilment of the generality requirement.

46. Lastly, he observed that one important issue seemed to be missing from the second report, namely the question of the burden of proof concerning the existence of customary international law, a topic that was of great practical significance. His initial thought was that a party that invoked a certain rule of customary international law bore the burden of proving the existence of that rule. However, it was a topic that should be explored in greater detail.

47. He was in favour of referring the entire set of draft conclusions to the Drafting Committee.

48. Mr. MURASE said that, although the definition of customary international law contained in draft conclusion 2 (*a*) was an improvement on the one contained in the previous report,[221] it was still unacceptable for several reasons. First, it was hard to understand why the ambiguous phrase "a general practice accepted as law" had been included, since it was an expression that had been severely criticized by many writers. To say that customary international law was something "accepted as law" was simply tautological, and the variety of meanings attaching to the verb "accept" made it unsuitable for inclusion in the definition.

49. Second, the phrase "derive from and reflect" was highly ambiguous; in order to ensure that State practice and *opinio juris* were given equal status, draft conclusion 2 (*a*) should be reformulated to read: "Customary international law means the rules of international law that are constituted by general practice and *opinio juris*."

50. Third, the definition of customary international law appeared to rest, at least partially, on the faulty premise that general practice must always precede *opinio juris* in the formation of custom. That was not always the case, however. While it was true that, traditionally, the formation of customary international law began with the accumulation of State practice, to which *opinio juris* subsequently attached, the order had often been reversed in recent years. *Opinio juris*, as expressed in General Assembly resolutions or the declarations of international conferences, frequently preceded general State practice. If the Commission intended to adhere to a two-element model of custom formation, the definition of customary international law should treat both elements equally.

51. Fourth, the definition failed to refer to the fact that customary international law was "unwritten" law (*lex non scripta*). Even if a rule of customary international law was formed on the basis of treaties or written instruments, the customary rule itself was not *lex scripta*; it was an unwritten law.

52. Lastly, he did not agree with the suggestion by the Special Rapporteur that draft conclusion 2 (*a*) be moved to the general commentary.[222] A definition of customary international law was required as a stand-alone conclusion, separate from the use of other terms.

53. Turning to the issue of double counting or repeat referencing of the same evidence for both State practice

[221] See *Yearbook … 2013*, vol. II (Part One), document A/CN.4/663, p. 126, para. 45.

[222] See the 3222nd meeting above, p. 109, para. 16.

and *opinio juris*, he said that, if the Commission were to maintain the two-element model of custom formation, it was important to distinguish between those two elements as much as possible. However, the Special Rapporteur undermined that model by counting the same evidence for both elements. The manifestations of State practice listed in draft conclusion 7, paragraph 2, were virtually identical to the forms of evidence of *opinio juris* set out in draft conclusion 11, paragraph 2. Rather than enumerating the sources of evidence for *opinio juris*, the Special Rapporteur should elaborate on the methods practitioners might use to locate evidence of *opinio juris*.

54. He proposed that the Commission maintain the two-element model at a theoretical level, but take a more flexible approach to the actual identification of the subjective element, along the lines of section 19 of the International Law Association's London Statement of Principles Applicable to the Formation of General Customary International Law.[223] Under that approach, *opinio juris* could compensate for a relative lack of State practice, thus assuming a complementary function. In any event, it was clear that further reflection on the complex issue of *opinio juris* was needed. Accordingly, the Commission should wait until 2015 before sending draft conclusions 10 and 11 to the Drafting Committee.

55. Turning to draft conclusion 1, he said that, in paragraph 1, the word "methodology" should be replaced by "methods" and that, in paragraph 2, the phrase "the methodology concerning" should be deleted.

56. Draft conclusion 3 began with the phrase "To determine the existence of a rule of customary international law", raising the question of who made such a determination. The allocation of the burden of proof with respect to customary international law was a serious matter in some domestic courts. In Japan, for example, under the rules of civil procedure, if a rule was asserted as customary law, the court had to make a determination in that regard *proprio motu*. On the other hand, if the rule was asserted merely as *de facto* custom, which nonetheless had certain normative effects, the burden of demonstrating its existence fell on the party making the assertion. Unlike in domestic legal systems, there was no supreme court at the international level to make ultimate determinations on customary rules. Furthermore, most disputes did not end up before the International Court of Justice or other international juridical bodies. As a result, the attitudes and arguments of the parties were of much greater importance in international law than in domestic law.

57. He shared Mr. Park's doubts about the usefulness of draft conclusion 4, on assessment of evidence. First of all, it was not clear what kind of evidence the Special Rapporteur actually had in mind. Assessment of evidence required much clearer and more solid criteria than what was contemplated by the ambiguous phrase "regard must be had to". When it came to assessing evidence, reliance could not be placed on such unsettled and contingent factors as "context" and "surrounding circumstances".

58. The first sentence of draft conclusion 7, paragraph 1, "Practice may take a wide range of forms", was merely a factual description and was perhaps not appropriate in a conclusion.

59. Draft conclusion 8 seemed unnecessary. He had reservations about both paragraph 1, which seemed to state the obvious, and paragraph 2, which appeared to disregard the fact that it was quite normal within democratic countries for State organs to express conflicting views.

60. With regard to draft conclusion 9, he had doubts about the rather vague wording in the first paragraph to describe the requirement that practice must be general. It would be preferable to use the phrase "extensive and virtually uniform", the terminology employed by the International Court of Justice in the *North Sea Continental Shelf* cases. He also questioned the reference to the controversial concept of "specially affected" States in paragraph 4.

61. In draft conclusion 10, paragraph 2, the use of the adjective "mere" to describe "usage" suggested that the latter had no normative force. However, that was not necessarily the case, since *de facto* custom or usage to which *opinio juris* had not yet attached might have a certain limited normative effect in both domestic law and international law.

62. On a final point, he said he hoped that the Special Rapporteur would address the question of unilateral measures and their opposability as part of his future work on the identification of customary international law.

63. Mr. CAFLISCH said that he had only a few comments to make on the draft conclusions, which, in his opinion, should all be sent to the Drafting Committee.

64. With regard to draft conclusion 1, he agreed with Mr. Murase that "methodology" should be replaced by "methods".

65. Draft conclusion 2 (*a*) constituted a useful clarification of Article 38, paragraph 1 (*b*), of the Statute of the International Court of Justice.

66. In draft conclusion 4, perhaps it would suffice to refer to the "surrounding circumstances", which presumably encompassed the "context".

67. In draft conclusion 5, the word "primarily" was used, not in relation to the acceptance of a practice as law, but rather to the contribution to that practice that might be made by non-State actors. Perhaps that might be clarified.

68. Under draft conclusion 9, State practice had to be "sufficiently widespread" for it to be established as a rule of customary international law. It might be preferable to delete the adverb "sufficiently".

69. While he understood the Special Rapporteur's desire not to address the "general principles of law recognized by civilized nations", referred to in Article 38, paragraph 1 (*c*),

[223] London Statement of Principles Applicable to the Formation of General Customary International Law, adopted by the International Law Association in its resolution 16/2000 (Formation of general customary international law), of 29 July 2000. See *Report of the Sixty-ninth Conference held in London, 25–29th July 2000*, London, 2000, p. 39. The London Statement is reproduced in *ibid*., pp. 712–777.

of the Statute of the International Court of Justice, he would like to see some reference to the fact that a general principle of law that was applied with sufficient consistency became a rule of customary international law. His concern was not of a purely theoretical nature; the transformation of a principle into a customary rule could have an impact on establishing the evidence of that rule.

70. With regard to *opinio juris*, which the Special Rapporteur addressed in paragraphs 65 to 68 of the second report, he questioned whether it was still the case, as doctrine had at times affirmed, that a belief might be considered to be a psychological element, if the conduct in question corresponded not to *opinio juris stricto sensu*, but to an overriding need.

71. The practice and *opinio juris* of States that were part of federal States should perhaps be taken into account. Consideration could also be given to NGOs that had functions under international law, such as ICRC, to the extent that practice and *opinio juris* related to those functions.

The meeting rose at 12.55 p.m.

3224th MEETING

Wednesday, 16 July 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Cooperation with other bodies (*continued*)

[Agenda item 14]

STATEMENT BY REPRESENTATIVES OF THE COUNCIL OF EUROPE

1. The CHAIRPERSON welcomed the representatives of the Council of Europe, Ms. Lijnzaad, Chairperson of the Committee of Legal Advisers on Public International Law (CAHDI), and Ms. Requena, Head of the Public International Law Division and Treaty Office, Council of Europe and Secretary to CAHDI.

2. Ms. LIJNZAAD (Council of Europe) said that she welcomed the opportunity that was afforded to CAHDI every year to present its work to the International Law Commission. CAHDI was an intergovernmental committee, which, twice a year, brought together the legal advisers on public international law of the ministries for foreign affairs of Council of Europe member States, as well as a significant number of representatives of observer States and international organizations, in order to examine issues relating to public international law and to promote exchanges and the coordination of views among member States. CAHDI also provided opinions at the request of the Committee of Ministers. In March 2014, it had issued an opinion on Recommendation 2037 (2014) of the Parliamentary Assembly of the Council of Europe on the accountability of international organizations for any human rights violations that might occur as a consequence of their activities, in which it had underscored the fact that the privileges and immunities of international organizations were essential for the fulfilment of their mission and were governed by international law.[224] CAHDI invited international organizations to consider waiving such immunities where appropriate in individual cases and drew their attention to the recent case law of the European Court of Human Rights on the scope of such immunity and on the question of the availability of "reasonable alternative means".

3. CAHDI had also examined certain practical aspects of immunity, particularly in relation to international organizations. At its meeting in March, it had held an exchange of views on the settlement of disputes of a private character to which an international organization was a party, during which emphasis had been placed on gaps in the application of the principle of accountability of international organizations in cases of human rights violations—an issue of special relevance to peacekeeping operations—and on the need to address that situation by supplementing section 29 of the Convention on the Privileges and Immunities of the United Nations.

4. Another topic on the programme of work of CAHDI, the immunity of State-owned cultural property on loan, had been an issue in several disputes in recent years, in particular in *Diag Human SE* v. *the Czech Republic*. It posed a number of problems, in particular in regard to the origin of the property in question and uncertainty as to whether the seizure of property forming part of a cultural heritage was acceptable as repayment of a commercial debt. It was therefore necessary to clarify the status of such property, especially since the United Nations Convention on Jurisdictional Immunities of States and Their Property, which covered that matter, had not yet been widely ratified. CAHDI had therefore considered how it could contribute to the ongoing reflection on improving the level of protection for cultural objects on loan and had discussed a draft non-binding declaration recognizing the customary nature of the pertinent provisions of the Convention. Other discussions had centred on the immunities of special missions, a topic of great practical importance since States increasingly employed such missions, and on problems of international law posed by recent events in Ukraine, namely violations of such fundamental principles as territorial integrity, the inviolability of frontiers and the prohibition of the threat or use of force. A questionnaire on each of those subjects had been sent to States and observers. Their answers would be considered at the Committee's meeting in September. CAHDI had also reviewed several Council of Europe conventions,

[224] CAHDI, Meeting report, 47th meeting, Strasbourg, 20–21 March 2014 (CAHDI (2014) 11), appendix III, para. 7.

including the European Convention for the peaceful settlement of disputes, whose ratification, it had concluded, should be encouraged, since the Convention was still not widely known, even though it had been used to bring a number of cases before the International Court of Justice. In the coming months, CAHDI would study the responsibility of international organizations, the division of responsibility between States and international organizations, mutual legal assistance, and the possible accession of the European Union to the European Convention on Human Rights. Lastly, it should be noted that CAHDI had developed databases on practice relating to immunities of States, on the organization and functions of the office of the legal adviser of the ministry for foreign affairs in various countries, and on national measures for the implementation of sanctions imposed by the United Nations and for respect for human rights.

5. Ms. REQUENA (Council of Europe) said that the work of the Committee of Ministers currently focused on stepping up cooperation in order to combat corruption and on strengthening the protection of vulnerable persons and young people. Protocols No. 15 and No. 16 to the European Convention on Human Rights had been opened for signature in June 2013 and October 2013, respectively. The first, which had, at the time of speaking, obtained 8 ratifications and 31 signatures, provided for the insertion into the preamble to the Convention of an explicit reference to the principle of subsidiarity and the doctrine of the "margin of appreciation" and reduced the time limit within which an application could be made to the Court from six to four months. The second provided that, in the context of a case pending before them, the highest national courts and tribunals could request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the Convention or the protocols thereto.

6. Two new protocols had entered into force in 2014, namely the Protocol to the European Convention for the Protection of the Audiovisual Heritage, on the Protection of Television Productions and the Fourth Additional Protocol to the European Convention on Extradition. The Council of Europe Convention on preventing and combating violence against women and domestic violence was expected to enter into force in the near future. It should also be noted that the Committee of Ministers had recently adopted the Council of Europe Convention against Trafficking in Human Organs and the Council of Europe Convention on the Manipulation of Sports Competitions.

7. The Court of Justice of the European Union was expected to give its opinion in the coming months on the revised draft agreement on the accession of the European Union to the European Convention on Human Rights and the accompanying explanatory report that had been submitted to it in 2013.[225] Generally speaking, the accession of the European Union to Council of Europe treaties raised many complex issues that must be addressed not only from the standpoint of European Union law but also—especially—from that of general international law, including the law of treaties.

8. With regard to the European Neighbourhood Policy of the Council of Europe, the Parliamentary Assembly had established a "partner for democracy" status in order to foster institutional cooperation with the parliaments of non-member States in neighbouring regions that wished to benefit from the Assembly's experience in democracy-building and to participate in the political debate on common challenges that transcended European boundaries. In that context, there were plans to set up a Council of Europe office in Rabat. The Committee of Ministers had recently accepted application by Kosovo for membership of the European Commission for Democracy through Law (Venice Commission); it had done so, however, without prejudice to the individual positions of member States of the Council on the status of that entity.[226]

9. In conclusion, she stressed the importance of cooperation between the United Nations and the Council of Europe and recalled that the latter welcomed the accession to its legal instruments of States from other regions as a means of furthering the development of international law. In that connection, she noted the significance of the recent judgment handed down by the Grand Chamber in the case of *Al-Dulimi and Montana Management Inc.* v. *Switzerland*, which concerned sanctions that had been adopted by the United Nations Security Council. Although the Court did not call into question the hierarchy of the Charter of the United Nations and the European Convention on Human Rights, it nevertheless found that it could be presumed that the Security Council did not mean to impose any obligation on Member States that would violate fundamental principles regarding the protection of human rights. The Court noted that a State could not invoke the binding nature of a Security Council resolution as justification for violating human rights and must take all possible measures to implement the sanctions regime. It concluded that, so long as the United Nations failed to provide any means of effective and independent judicial review of the legitimacy of placing individuals or entities on a sanctions committee's list, it was essential that such individuals and entities be allowed to request a review by the national courts of any measure taken to implement the sanctions regime.

10. Mr. KITTICHAISAREE asked whether the initiative aimed at improving the international framework for mutual legal assistance and extradition on investigating and prosecuting the most serious crimes was likely to succeed, given that it was bound to fail in certain respects. He also asked whether, during the exchange of views on the situation in Ukraine, reference had been made to the advisory opinion of the International Court of Justice on *Accordance with International Law of the Unilateral Declaration of Independence with respect to Kosovo*.

11. Mr. PETRIČ asked whether, during that same exchange of views, the right of peoples to self-determination, which flowed from the Charter of the United Nations and was one of the fundamental principles of international law, along with that of the sovereign equality of States, had been mentioned as an element to be taken into account in order to reach a solution that was consistent with international law. He welcomed the fact that Kosovo

[225] See Council of Europe, "Fifth negotiation meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights: Final report to the CDDH" (document 47+1(2013)008rev2], appendices I and V.

[226] Council of Europe, Committee of Ministers, 1202th meeting, document CM/Del/Dec(2014)1202/10.3.

was now a member of the Venice Commission and found it regrettable that the Constitutional Court of Kosovo, which played a leading role in protecting the rights of minorities in Kosovo, was still excluded from the Conference of European Constitutional Courts.

12. Mr. SABOIA, referring to the immunity of State-owned cultural property on loan, requested additional information on the method used by CAHDI to identify the customary nature of the relevant provisions of the United Nations Convention on Jurisdictional Immunities of States and Their Property. He wondered whether, in the case of the removal of cultural property from its rightful owners by illegitimate means, other principles took precedence over the principle of immunity. In addition, although some Council of Europe treaties—whose universal relevance had been underscored—were of considerable usefulness, it was regrettable that the procedure for accession to them by non-member States was complicated. That procedure should be simplified so as to strengthen cooperation with States in other regions.

13. Ms. LIJNZAAD (Council of Europe) said that it was important for CAHDI to discuss the status of the initiative on mutual legal assistance on investigating and prosecuting the most serious crimes without prejudging the outcome of the debate. CAHDI had examined the situation in Ukraine at its meeting in March 2014 from the standpoint of the Council of Europe, in other words it had considered the inter-State application lodged by Ukraine against the Russian Federation before the European Court of Human Rights,[227] resolution 1974 (2014) on the functioning of democratic institutions in Ukraine adopted by the Parliamentary Assembly in January 2014, the two opinions of the Venice Commission on various issues of constitutional law, including the referendum in Crimea,[228] the visit to Ukraine planned by the Advisory Committee on the Framework Convention for the Protection of National Minorities, and discussions in the Committee of Ministers. The delegations of Ukraine and the Russian Federation had been given the opportunity to state their positions, and issues concerning the relevance of the advisory opinion of the International Court of Justice on *Accordance with International Law of the Unilateral Declaration of Independence with respect to Kosovo* and the right to self-determination had been raised. Although viewpoints still differed, CAHDI had played its role, which was to provide the Committee of Ministers with the elements of public international law that would allow it to express the position of the Council of Europe. CAHDI had not agreed on the adoption of the proposed draft declaration on the immunity of State-owned cultural property on loan[229] because, despite the fact that the declaration might have been seen as clarification of *opinio juris*, a number of members did not consider that the provisions of the United Nations Convention on Jurisdictional Immunities expressed customary rules.

14. Ms. REQUENA (Council of Europe) added that, with regard to Ukraine, the Committee of Ministers decision did not mention the right to self-determination but concentrated on the question of territorial integrity. That said, the role played by the Council of Europe as a forum for discussion, and that of the Secretary-General, were very important, since both of the States concerned were members of the Council of Europe. The admission of Kosovo to the Venice Commission had no legal bearing on its recognition as a State. She agreed that, despite the universal relevance of Council of Europe treaties, the accession procedure to which non-member States were subject was fairly complex but that, aside from the requisite consent of the Committee of Ministers—which could admittedly pose problems—that complexity had less to do with the Council than with the accession regime provided for by the treaties themselves. Despite that, there were a growing number of applications, and the procedure for processing them had been simplified substantially.

15. Mr. NOLTE wished to know whether efforts to strengthen the activities of the Council of Europe in the area of the protection of personal data, namely updating the Convention for the protection of individuals with regard to automatic processing of personal data, had served to intensify the debate on those issues at the global level. He asked whether the admission of Kosovo to the Venice Commission, without prejudice to the issue of its status, might set a precedent for Palestine and whether the case of Palestine had played a part in discussions on how to handle Kosovo. With regard to Ukraine, he wished to know whether the Council of Europe had taken up the issue of the non-recognition of the acquisition of a territory through the illegal use of force and whether the Venice Commission, which had already given its opinion on several occasions on questions of general international law, had been asked to examine that matter.

16. Mr. ŠTURMA said that the draft declaration on jurisdictional immunities of State-owned cultural property had been prompted by a joint initiative presented by Austria and the Czech Republic following the *Diag Human SE* v. *the Czech Republic* case, the objective having been to avoid the refusal to loan cultural property for fear of its seizure. As to the question of the accession of the European Union to Council of Europe treaties, and more particularly the impact of changes in the respective competences of the European Union and its member States on the signature of or accession to those instruments, the solution whereby member States withdrew in favour of the European Union was regrettable and was as prejudicial to the law of treaties as it was to general international law. A set of rules on succession, for example, would no doubt be more appropriate, and it would be interesting to hear the opinion of CAHDI in that regard.

17. Ms. ESCOBAR HERNÁNDEZ said that she wished to thank the Chairperson of CAHDI for having organized the international seminar on the immunity *ratione materiae* of State officials from foreign criminal jurisdiction, which had examined the notion of an "official act". With regard to Kosovo, the "without prejudice" clause, on which the Committee of Ministers had made membership of Kosovo of the Venice Commission conditional, confirmed the position that the recognition

[227] *Ukraine* v. *Russia*, Application no. 20958/14, lodged on 13 March 2014, European Court of Human Rights.

[228] Venice Commission, Council of Europe, Opinion no. 762/2014 of 21 March 2014 (CDL-AD(2014)002), and Opinion no. 763/2014 of 21 March 2014 (CDL-AD(2014)004).

[229] CAHDI, "Immunity of State owned cultural property on loan", 46th meeting, Strasbourg, 16–17 September 2013 (CAHDI (2013) 10), chap. III.

of a State remained a sovereign and bilateral competence that did not affect membership in a particular organization. It would be interesting to know whether, during the debate, a distinction had been drawn between recognition by member States and recognition by the organization—in other words, recognition as a State as a prerequisite for admission to an organization, an institution or body—given that those points were related to the implications of the admission of Kosovo for the situation of Palestine.

18. Mr. WAKO asked whether other regional international organizations might be permitted to use the CAHDI website.

19. Ms. LIJNZAAD (Council of Europe) said that there had been no explicit reference to Palestine during the debates on the admission of Kosovo to the Venice Commission, but that it was clear that the States participating in it had had in mind the situation of those entities—especially that of Palestine. Generally speaking, the question of recognition had not been addressed, but it was possible that the viewpoint of international organizations differed from that of States and that the former believed they had a role to play in that regard. To date, CAHDI had not considered the question of the accession to treaties of entities not recognized as States—notably Palestine—nor that of the acquisition of territory by force.

20. The relationship between the European Union and its member States was indeed becoming increasingly complex. The position of the Council of Europe was that it was essential to maintain a balance between States that belonged to the European Union and those that did not. The reason was that, although they shared certain traditions and a common appreciation of the importance of the rule of law and human rights, it was necessary to avoid the development of two factions. The Council's role was to seek a coherent approach that heeded their divergent interests. Her personal viewpoint was that the European Union should take an in-depth look at its activities in the sphere of public international law.

21. Ms. REQUENA (Council of Europe) said that, when it was adopted, the Convention for the protection of individuals with regard to automatic processing of personal data had been one of the most progressive in its field, but it had quickly been overtaken by developments in the field of information technology. The Council of Europe was working on revising it and accompanying it with follow-up mechanisms, which required settling many legal and political issues.

22. Palestine did not have observer status with the Parliamentary Assembly of the Council of Europe, but rather that of guest. In the same way that it was a party to several United Nations conventions, it planned to accede to various Council of Europe treaties; for the time being, however, there were no negotiations under way concerning its accession. With regard to Ukraine, the Venice Commission had issued two opinions on two specific issues: the compatibility with constitutional principles of the decision of the Supreme Council of the Autonomous Republic of Crimea in Ukraine to hold a referendum on the question of whether to become a constituent territory of the Russian Federation, and the compatibility with international law of the procedure for the admission of the Autonomous Republic of Crimea to the Russian Federation. However, the situation had evolved so rapidly that, by the time the Committee of Ministers had adopted its resolutions, those questions were no longer pertinent.

23. As far as Kosovo was concerned, the Committee of Ministers had issued a statement in which it recognized Kosovo as a member—not a member State—of the Venice Commission. That statement had therefore had no impact on the positions of the member States of the Council of Europe on the recognition of Kosovo as a State. Some States had issued a statement indicating that, in their view, only a State could be a member of Council bodies, but the question had not been settled. Nor had the Council settled the question of the accession of Palestine to certain international instruments, since it was not within its authority to do so, but rather it was a matter to be decided by consensus among member States.

Identification of customary international law (*continued*) (A/CN.4/666, Part II, sect. D, A/CN.4/672)

[Agenda item 9]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

24. The CHAIRPERSON invited the Commission to resume its consideration of the second report of the Special Rapporteur on identification of customary international law (A/CN.4/672).

25. Mr. MURPHY said that, while he appreciated the succinctness of many of the draft conclusions, it was questionable whether the Commission should leave it up to the commentary to supply the necessary nuances and to set out important restrictions or clarifications, as many users would limit themselves to consulting only the text of the conclusions. The question of whose practice and whose *opinio juris* was to be considered relevant for determining the existence of customary international law remained ambiguous. Draft conclusion 3 did not indicate whose practice was relevant or who accepted it as law. By stating that it was "primarily" the practice of States that was of interest, draft conclusion 5 left open many other possibilities, such as the practice or *opinio juris* of transnational corporations, NGOs and think tanks. Draft conclusion 7 stated in paragraph 1 that practice might take a wide range of forms, which suggested a rather broad ambit, while paragraph 3 failed to indicate whose inaction was relevant. Similarly, the reader learned in paragraph 2 that manifestations of that practice "included" the conduct of States and, in paragraph 4, that the acts of international organizations could also serve as practice, but without being able to infer from the text whether those actors were the only ones whose practice was relevant.

26. That ambiguity could be the result of the Special Rapporteur's view that perhaps most of the practice was State practice, but that there was a sliver of practice by international organizations that might also count. Yet, if this latter practice were to be taken into account, there was a risk that it would create uncertainty and confusion.

Sometimes the State alone was mentioned in the draft conclusions, while at other times it was not mentioned at all, a situation which opened the door to any number of other actors. If the Commission decided to mention international organizations as primary actors in the formation of customary law, it would be preferable for it keep the main focus on States throughout the draft conclusions and to find some other appropriate way to take into account the role of international organizations.

27. Turning to the consideration of individual draft conclusions, he would prefer to retain draft conclusion 1 as it was currently worded, but he would have no objection to moving paragraph 2 to the commentary. With regard to draft conclusion 2, he found it, at best, redundant and, at worst, confusing to attempt to define in a single draft conclusion terms that would be used throughout the entire set of draft conclusions. Such a task would better be left to the commentary. He agreed with the wording of draft conclusion 3, as he did not believe that there were different approaches in that regard. He offered to provide the Special Rapporteur with citations of recent cases in the United States that supported the "two constitutive elements" approach. With regard to draft conclusion 4, he agreed with Mr. Caflisch that the expression "the surrounding circumstances" was unhelpful, and he proposed that the end of the sentence be replaced with "including the nature of the evidence, the situation in which the evidence arises, and its relationship to other available evidence". As to draft conclusion 5, he proposed that the word "primarily" either be deleted or placed in square brackets until the Commission had considered the Special Rapporteur's third report. Contrary to what the Special Rapporteur had said, that word did not appear in the text of the judgment in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, but rather in that of the judgment in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, which nowhere suggested that the practice of other actors was also relevant. He proposed that draft conclusion 6 be entitled "Relevant practice" and that it specify that the conduct of the State was that which was "authorized by and attributable to a State", since the current wording gave the impression that even the conduct of a State organ that had overstepped its authority or acted in contravention of its instructions was attributable to the State.

28. As for draft conclusion 7, he endorsed paragraph 1 and, in paragraph 2, which he considered to be excellent, he proposed the replacement of the word "manifestation" with "forms". His preference would be to place paragraph 3 in square brackets—especially since the Special Rapporteur had indicated in paragraph 42 of his second report that he would revisit the issue of inaction—or to move it to draft conclusion 2 and reformulate it to say that "inaction by a State may also serve as practice when the circumstances call for some reaction". He would like to raise five points with respect to paragraph 4, which might also be placed in square brackets pending the Special Rapporteur's third report. First, the paragraph made no mention of the practice of States within international organizations, which was alluded to at the end of paragraph 2 in the phrase "acts in connection with resolutions of organs of international organizations and conferences", but spoke only of the practice of international organizations, without any explicit or implicit connection with the practice of States. Second, since it did not establish any limitations, it gave the impression that any practice by an international organization might be relevant, whereas a reading of the second report showed that this was not the Special Rapporteur's intention. Once again, it would be better not to leave it to the commentary to provide the necessary explanations. Third, there was nothing in the second report that supported the proposition set forth in paragraph 3 of draft conclusion 7. The cases cited by the Special Rapporteur did not sufficiently substantiate his reasoning, and the scholarly literature was deeply divided on whether the practice of an international organization, strictly speaking, was relevant to an analysis of customary international law. Fourth, apart from the fact that the European Union was an atypical international organization, paragraph 44 of the second report indicated that European Union member States had transferred exclusive competences to it, which was an important caveat that did not appear in paragraph 4 of draft conclusion 7. Finally, the Special Rapporteur had not dealt with the question of whether there must also be *opinio juris* of the international organization operating in tandem with its practice. Draft conclusion 7, paragraph 4, referred to the practice of international organizations, but draft conclusion 11 did not. He asked whether the Special Rapporteur could provide examples in which international organizations adopted behavior based on a belief that they were compelled to do so by the same customary international law that bound States. Many of them would probably be resistant to such a notion: the fact that the Commission had developed entirely separate sets of draft articles concerning the responsibility of States for internationally wrongful acts[230] and the responsibility of international organizations,[231] and that the same dichotomy existed in other areas, such as immunities, raised some doubt that international organizations were actors in the realm of customary international law in the same way as States. Perhaps it would be wiser to consider that they were different types of actors who operated in different realms of customary law. It appeared, however, that it was widely believed that the practice of an international organization was not an independent source of practice relevant to identifying the customary international law that was binding upon States. If the Commission said otherwise, it should base its view on a very thorough and careful analysis of practice, case law and scholarship that was accompanied by appropriate examples.

29. He pointed out with reference to draft conclusion 8 that, although it was true that there was no predetermined hierarchy among the various forms of practice, there was nevertheless a certain hierarchy in specific cases. Without it, the conduct of a sheriff in a small town in the United States would have as much weight as that of the Department of Justice, and the decision of a municipal court as

[230] General Assembly resolution 56/83 of 12 December 2001, annex. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

[231] See the draft articles on the responsibility of international organizations adopted by the Commission at its sixty-third session and the commentaries thereto in *Yearbook … 2011*, vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

much as a Supreme Court ruling. That would be all the more problematic if, as stated in paragraph 2 of the draft conclusion, "[w]here the organs of the State do not speak with one voice, less weight is to be given to their practice". Perhaps in order to address that problem it would be sufficient to indicate that the organs in question were "the highest competent organs".

30. Concerning draft conclusion 9, and given that the term "general practice" was used throughout the set of draft conclusions, he proposed that the beginning of paragraph 1 of draft conclusion 9 be reformulated to read "General practice means that the practice must be widespread" and, for the sake of consistency, that the title of the draft conclusion be amended to read "General practice must be widespread, representative and consistent". Perhaps reference should also be made to the fact that, in certain cases, practice was disregarded—for example, practice that was inconsistent with Article 2, paragraph 4, of the Charter of the United Nations and that was considered unlawful by States. As to draft conclusion 10, in paragraph 1, he proposed the replacement of the words "accompanied by" with "undertaken out of" and the insertion of the words "right or" before "obligation". He proposed the addition of a paragraph 3 that would read: "In some instances, a State may deviate from a general practice accepted as law due to a belief that a new practice will be followed and accepted as law by other States. In such circumstances, the law may change over time". In draft conclusion 11, he proposed that the clause "which indicate what are or are not rules of customary international law" be moved so that paragraph 2 would begin: "The forms of evidence which indicate what are or are not rules of customary international law include, but are not limited to". In addition, in order better to capture the analysis contained in paragraph 74 of the report, paragraph 4 could be reformulated to read: "Acceptance as law by a State generally is not evidenced by the underlying practice alone."

31. In conclusion, he was in favour of referring all of the draft conclusions to the Drafting Committee.

The meeting rose at 1 p.m.

3225th MEETING

Thursday, 17 July 2014, at 10 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Organization of the work of the session (*continued*)*

[Agenda item 1]

1. The CHAIRPERSON drew attention to the programme of work for the remaining three weeks of the session. If he heard no objection, he would take it that the Commission wished to adopt it.

2. Mr. KITTICHAISAREE said that little time seemed to have been allocated to the topic of the provisional application of treaties.

3. The CHAIRPERSON emphasized that the programme was provisional. If additional time was required to discuss a particular topic, it could be amended. He asked whether the Commission agreed to adopt the programme of work on that understanding.

It was so decided.

Identification of customary international law (*continued*) (A/CN.4/666, Part II, sect. D, A/CN.4/672)

[Agenda item 9]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

4. The CHAIRPERSON invited the Commission to resume its consideration of the second report of the Special Rapporteur on the identification of customary international law (A/CN.4/672).

5. Mr. VÁZQUEZ-BERMÚDEZ, referring to the Special Rapporteur's suggestion to use the phrase "accepted as law" in preference to "*opinio juris*", said that problems with the latter term had arisen more in academic circles than in practice. "*Opinio juris*" was used frequently by the International Court of Justice and other international and domestic tribunals, as well as by States and in the literature; it reflected the flexible and dynamic nature of customary international law and avoided literal or mistaken interpretations, to which the suggested alternative could give rise. The Special Rapporteur himself had referred to "*opinio juris*" several times in his second report. He therefore agreed with those who had suggested that it should be used in place of "accepted as law" wherever the latter phrase occurred in the draft conclusions. It must remain clear that the subjective element of custom, however it was referred to, was not the same as State consent or the will of States: rather, it was the belief that a particular practice was required under international law. Draft conclusion 10 went some way towards explaining the distinction, but should be modified slightly.

6. Some members of the Commission had suggested that, in draft conclusion 1, paragraph 1, the word "methodology" should be changed to "method". He could agree to that suggestion, but would prefer "methods", as there was more than one method for identifying the existence and scope of customary international law.

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* Resumed from the 3222nd meeting.

7. One method of identifying the existence and content of a rule of customary international law was to conduct an exhaustive analysis of a particular practice and its accompanying *opinio juris*; however, as the President of the International Court of Justice had pointed out, the Court did not undertake such an inquiry for every rule claimed to be customary in a particular case, making use instead of the best and most expedient evidence available to determine whether a customary rule existed. Sometimes the Court examined practice directly; more often, it considered evidence deriving from codification or subsidiary sources of international law, including draft articles produced by the Commission and resolutions of the United Nations General Assembly. It frequently recognized the existence of a rule of customary international law in the form in which it had been codified, including where a rule had acquired customary status after codification. Exhaustive examination of State practice was exceptional for the Court.

8. The Court and the Commission had a significant influence on each other's work. The Court also influenced other international courts, States and domestic courts, which did not replicate the work done by the Court to identify the existence and scope of a customary rule. It would be useful for the Special Rapporteur to refer to the Court's practice and its recognized authority, which the Commission shared, to identify rules of customary international law.

9. Draft conclusion 1 referred to "peremptory norms of international law (*jus cogens*)", but both in the text of the draft conclusions and in the commentary, the word "general" should be added, so that the phrase reads "peremptory norms of general international law (*jus cogens*)". That would bring it into line with the wording of the 1969 Vienna Convention and indicate that a rule of *jus cogens* was of universal application.

10. It did not seem necessary to include definitions of customary international law and international organizations in the draft conclusions; if they were retained, they should be discussed in detail by the Drafting Committee. He saw no reason why international organizations, which were subject to international law and enjoyed legal personality separate from that of their member States, could not contribute to the formation of customary international law. If that was the intention behind the inclusion of the word "primarily" in draft conclusion 5, it could be retained. The purpose of the draft conclusion was somewhat unclear, however, since its title was "Role of practice".

11. Turning to draft conclusion 7, he expressed support for the inclusion of the acts and inaction of international organizations as examples of practice, but emphasized that resolutions of organs of international organizations and conferences should be considered in the context of the circumstances of their adoption. Explanations of vote tended to come from States that voted against a particular resolution or abstained from voting. Taking such statements as evidence of practice or *opinio juris*, but ignoring votes in favour, could skew an analysis to favour a minority position. Acts carried out in connection with such resolutions should not be considered in isolation from the resolutions themselves. States took particular care when negotiating and adopting resolutions in international forums because they were aware of the legal consequences that those resolutions could have. The broad participation of States in international organizations yielded an equally broad contribution to practice and *opinio juris*.

12. In view of the basic principle of the sovereign equality of States, draft conclusion 9, paragraph 4, should be deleted. All States, not just specially affected ones, had an interest in the content, scope, creation and development of general international law in all fields, and their practice should carry equal weight.

13. Lastly, he expressed support for referring all the draft conclusions to the Drafting Committee.

14. Mr. TLADI said that the second report and the draft conclusions it contained were largely faithful to the Commission's aims in working on the topic, striking a balance between the normative and the descriptive. He endorsed the "two-element" approach to the identification of customary international law, but said that it sometimes appeared that a crucial element of the topic had been lost. The original title of the topic had been the "formation" of customary international law, and it had been changed to avoid translation difficulties, not to alter the direction of work on the project.[232] The second report mentioned the formation of customary international law only incidentally, but he hoped that this aspect would be integrated into future reports more deliberately, as a critical component of the Commission's work. Draft conclusion 1 might need to be amended to that end. Draft conclusion 5, on the other hand, made it plain that the Commission was concerned with the formation as well as the identification of customary international law.

15. He echoed the Special Rapporteur's doubts concerning the need to define "customary international law", but for different reasons: while there might be confusion as to how it was formed and identified, there was little doubt about the meaning of the term. Neither was it necessary to define "international organization" if there were no peculiar circumstances to warrant anything other than a standard textbook definition.

16. With regard to whether there were different approaches to the identification of rules of customary international law in different fields of international law, he questioned the assertion in paragraph 28 of the second report that this was not the case. Variations in how international courts and tribunals tackled the identification of customary rules could indeed indicate that different approaches existed, and the Commission should consider how and why that might be the case, rather than simply stating, as did the Special Rapporteur, that both elements were required and that any other approach risked artificially dividing international law. The two-element approach must not be advocated too rigidly, as Mr. Park had pointed out.

17. The overlap between draft conclusions 2 and 3 should be eliminated, preferably by removing the definition of "customary international law" from draft conclusion 2.

[232] See *Yearbook … 2013*, vol. I, 3186th meeting, p. 109, para. 21, and *ibid*., vol. II (Part Two), p. 64, paras. 65 and 69.

Draft conclusion 3 should incorporate the idea that both the formation and the identification of customary international law followed the same basic approach. If draft conclusion 4 was considered necessary, it could be merged with draft conclusion 3 or draft conclusion 8, although draft conclusion 8 did not deal with the notion of acceptance as law.

18. While he agreed with the Special Rapporteur that resolutions of organs of international organizations could serve as evidence of State practice, he emphasized that such resolutions should not be viewed in isolation: the process of negotiating and adopting them should be analysed as a whole, with a particular focus on the positions taken by individual States. He also agreed that inaction could count as practice; however, there was an additional nuance that should be reflected in draft conclusion 7. The fact that a high-ranking State official had never been prosecuted might indicate that he or she enjoyed immunity *ratione personae* if, and only if, the relevant authorities had considered prosecuting but ultimately decided not to do so.

19. With reference to draft conclusions 5 and 7, he concurred with the proposition that the search for practice was primarily aimed at the practice of States.

20. Instances in which the practice of entities other than States was used were exceptional, although they could occur. The conduct of international organizations could reflect the practice of States and, in some circumstances, the practice of international organizations themselves could be relevant. He hoped that such exceptions would be covered in the Special Rapporteur's third report.

21. With reference to draft conclusion 8, he shared the concern expressed about lessening the weight to be given to the practice of a State if its various organs did not speak with one voice, as that approach failed to take account of the relative power of the organs. The decisions of a country's highest court should not be discounted on account of the contrary practice of a municipal manager. He also shared the view that the practice of "States whose interests are specially affected" should not be taken to mean the practice of "powerful States" or even of the five Permanent Members of the Security Council, as that could have implications for the principle of the sovereign equality of States. The Commission might therefore need to define the phrase "States whose interests are specially affected" for the purposes of draft conclusion 9, paragraph 4.

22. Finally, he rejected Mr. Murase's criticism that the enumeration of the same sources to serve as evidence of both practice and *opinio juris* amounted to double counting and was inconsistent with the two-element approach. A resolution adopted every year on a particular issue undoubtedly counted as practice; if it contained exhortatory provisions, it also counted as *opinio juris*. Lastly, he expressed support for the transmission of the draft conclusions to the Drafting Committee.

23. Mr. FORTEAU, while praising the intellectual rigour of the Special Rapporteur's second report, said that the quantity of issues raised in the numerous draft conclusions threatened to bring the work of the Drafting Committee to a halt. More complex issues were to be taken up the following year. It would therefore be useful to know more about what was planned, particularly with regard to the form and content of the commentaries.

24. Having drawn attention to a translation problem in the title of the draft conclusions in French, he said that the term "*opinio juris*", which the Special Rapporteur had chosen to avoid for theoretical and conceptual reasons, should be introduced because it was widely used by States, in the literature and in rulings of international courts and tribunals, and it offered a simple alternative to the complicated paraphrase suggested. It also reflected the fact that the creation of custom did not rest on individual acceptance by each member of the international community, but on a generally held view within that community.

25. He expressed support for the general orientation of the draft conclusions and fully endorsed the two-element approach to the identification of customary international law. In draft conclusion 1, reference should be made, not only to the existence and content of customary rules, but also to their scope, so as to leave the door open to consideration of persistent objectors and non-universal, regional custom. Draft conclusion 1 should also refer, not to "methodology", but to "rules", a more accurate term in the context of the topic, which dealt with the secondary rules of international law that helped to determine how and when a rule could be deemed to form part of custom.

26. With regard to draft conclusion 5, he disagreed that it was primarily the practice of States that contributed to the creation of rules of customary international law. While that might be true for rules concerning relations between States, international law was not limited to such relations. The practice of international organizations was directly relevant. Draft conclusion 5 should therefore be deleted or substantially redrafted.

27. In draft conclusion 7, paragraph 2 should refer to administrative as well as legislative acts; paragraph 3 seemed premature, given that the Special Rapporteur's third report would deal with inaction. Draft conclusion 11, paragraph 3, also seemed premature, for the same reason. Only certain types of inaction could constitute practice. Inaction could be direct, as in the case of compliance with a customary prohibition, or indirect, such as the failure to object to the practice of other States, as reflected in the recent judgment of the International Tribunal for the Law of the Sea in the *M/V "Virginia G" Case (Panama/Guinea-Bissau)* (para. 218). Draft conclusion 7, paragraph 4, would be the subject of further discussion in light of the Special Rapporteur's third report, but he emphasized that, as international organizations enjoyed legal personality, their practices were attributable to the organizations themselves, not to their individual members, something that was appropriately reflected in the use of the term "general practice" in preference to "State practice".

28. Rather than giving less weight to the practice of States whose organs did not "speak with one voice", as suggested in draft conclusion 8, the focus should be directed towards establishing the consistency of a particular practice. The need to take account of all available

State practice, set out in draft conclusion 8, paragraph 2, raised two difficulties: how could the Commission help to make State practice more available to practitioners, and what was meant by "available" in a legal sense? Was it realistic to expect judges, particularly in domestic courts, to seek out all available State practice regarding a particular rule, or should they rely on the evidence presented by the parties to a case? He questioned the very use of the term "evidence" in the context of determining customary international law, suggesting that draft conclusions 4, 8 and 11 should instead refer to "means" or "modes" of establishing practice and *opinio juris*. According to the principle *jura novit curia*, it was for the judge to determine the law, not for the parties.

29. In draft conclusion 9, paragraphs 2 and 3 should be more consistent in referring to how general a practice must be for the purpose of establishing a rule of customary international law. Paragraph 4 seemed to go too far in interpreting the rulings of the International Court of Justice concerning the practice of States whose interests were specially affected: it risked creating inequalities among States. He endorsed the principle contained in draft conclusion 11, paragraph 4, because a single document could easily serve as evidence both of practice and of *opinio juris*.

30. Lastly, he recommended that the draft conclusions be transmitted to the Drafting Committee.

31. Mr. CANDIOTI, referring to Mr. Forteau's comment that it would be preferable to speak of "rules" rather than "methodology" in draft conclusion 1, recalled that the original aim of work on the topic had been to produce a guide for practitioners[233] rather than to elaborate secondary rules for determining the existence of customary international law.

32. Mr. MURASE, referring to comments made by Mr. Forteau and Mr. Tladi, said that he himself had not understood the Special Rapporteur's intention as being to consider the content of *opinio juris*.

33. Mr. PETRIČ said that he found the overall structure and formulation of the draft conclusions acceptable and that all 11 of them should be referred to the Drafting Committee. As the draft conclusions were intended to be of assistance to practitioners, they should be as explicit as possible, even if certain of them might appear self-evident to experts in international law.

34. With regard to draft conclusion 1, he concurred with Mr. Park about the need to replace the word "methodology" with a more appropriate alternative.

35. As to draft conclusion 2, he agreed with the Special Rapporteur's proposal to adopt a definition of customary international law based on the language of the Statute of the International Court of Justice. As the Statute of the International Court of Justice was one of the most widely accepted international legal instruments, the Commission should not depart in any significant way from its language and spirit, in particular Article 38.

36. It was unclear why the Special Rapporteur, when referring to customary international law, spoke only of "rules". It was well known that some principles established in international treaties, which were binding only *inter partes*, might subsequently be generally accepted by non-parties to a particular treaty and thus become part of customary international law. It would be helpful if the Special Rapporteur could clarify the reasoning behind his decision and also include a corresponding explanation in the commentary.

37. It should be made clear that, unless codified, customary international law was unwritten law, and the consequences of that fact in terms of its identification and interpretation should also be considered.

38. With regard to draft conclusion 3, it would be useful, either in the commentary or in the conclusion itself, to indicate who was responsible for determining the existence of a rule of customary international law. In the context of a dispute, it would probably be a court, an arbitrator or an organ of an international organization. The question, however, was whether States themselves were free to determine the existence and content of a rule of customary international law by claiming that there was a general practice accepted as law.

39. With respect to draft conclusion 5, he shared the concerns expressed by previous speakers regarding the term "primarily". If the word were to be retained, it should be clearly explained what type of practice, other than State practice, contributed to the creation of the rules of customary international law: otherwise, "primarily" might be understood as indicating that there was a hierarchy of practice among the various contributors to customary international law. Furthermore, the use of the word was at variance with draft conclusion 6, which referred only to State practice.

40. In paragraph 40 of the second report, the Special Rapporteur cited a non-exhaustive list of the main forms of practice, including "international and national judicial decisions". However, in draft conclusion 7, no mention was made of the judgments of international courts; bearing in mind the future users of the conclusions, it might be helpful if that omission were explained.

41. Furthermore, while the non-exhaustive list of types of State practice presented in paragraph 41 of the second report included the category of diplomatic acts and correspondence, it did not refer to the act of recognition, even though recognition of a custom, situation or claim was an important diplomatic act that produced legal effects. In addition, there was no mention of *démarches*. It would be useful if those omissions could be explained.

42. Draft conclusion 7, paragraph 3, which dealt with inaction, should be extensively elaborated upon in the commentary or even in a separate conclusion.

43. Draft conclusion 8, paragraph 1, which indicated that there was no predetermined hierarchy among the various forms of practice, was contradicted by paragraph 2, which suggested that the practice of one organ of a State might carry more weight than that of another.

[233] *Yearbook … 2012*, vol. II (Part Two), p. 69, para. 160.

44. With respect to draft conclusion 9, he agreed that practice had to be general, widespread and extensive. He also concurred with the Special Rapporteur's view, expressed in paragraph 53 of the second report, that practice followed by a relatively small number of States could create a rule in the absence of any conflicting practice. However, the question arose whether, absent any opposition by another State, the practice of just one State sufficed for the creation of a customary rule. It was a largely hypothetical question, but a famous case in point was the legal behaviour of the United States subsequent to its moon landing, which had led to the affirmation of the legal status of the moon and other celestial bodies as *res communis omnium*.

45. Although he basically agreed with draft conclusion 10, he was not sure whether the phrase "accompanied by a sense of legal obligation" was appropriate. In his view, there must be more than just a "sense" that the practice in question was perceived to be a legal obligation. The words "awareness" or "understanding" might be appropriate alternatives.

46. He generally agreed with draft conclusion 11, on evidence of acceptance of law, but suggested that the Special Rapporteur consider giving some attention in the commentary to the issue of so-called "professional public opinion", in other words the opinion of experts and bodies such as the International Law Association, as an element contributing to an awareness of what was accepted as law.

47. Mr. KITTICHAISAREE said that, since his view was that the identification process should be practical and realistic, he welcomed draft conclusion 4, which required that regard should be had to context, including the surrounding circumstances. In that connection, the Commission might consider the need to follow the four particular methods identified by the President of the International Court of Justice as having played an important role in the Court's assessment of evidence of customary international law, depending on the circumstances. Those methods were: referring to multilateral treaties and their *travaux préparatoires*; referring to United Nations resolutions and other non-binding documents that were drafted in normative language; considering whether an established rule applied to current circumstances as a matter of deduction; and resorting to an analogy.

48. In a world of nearly 200 States and various other international actors, draft conclusion 7, paragraph 2, and draft conclusion 11, paragraph 2, were right to encompass all forms of possible evidence of practice and acceptance as law, respectively. The main challenges, however, were how to establish that a "sense of legal obligation" was accompanied by a particular practice, as required under draft conclusion 10, paragraph 1, and how to identify situations where "double counting" was permissible under draft conclusion 11, paragraph 4.

49. With regard to the Special Rapporteur's assertion in paragraph 27 of the second report that the International Law Association's London Statement of Principles Applicable to the Formation of General Customary International Law[234] tended to downplay the role of subjective element in the identification of customary international law, he said that the Statement should be considered in its proper context. The International Law Association had rightly made a distinction among the different stages in the life of a customary rule, and had concluded that it was not always necessary to establish the existence of the subjective element of customary international law separately from the existence of the objective element.[235] Furthermore, the "paradox" or "vicious cycle argument" referred to in paragraph 66 of the second report had been resolved by the International Law Association, which had stated that, "[o]nce a customary rule has become established, States will naturally have a belief in its existence: but that does not *necessarily* prove that the subjective element needs to be present during the *formation* of the rule".[236]

50. With regard to the application of the two-element approach in different fields of international law, addressed in paragraph 28, he said that draft conclusion 4 correctly enunciated the fact that the identification of a particular rule of customary international law in any field must be considered in its proper context, including the surrounding circumstances.

51. Paragraph 62 of the second report posited that when a State acted in compliance with its treaty obligation, the act did not generally demonstrate the existence of *opinio juris*. In that context, a dilemma that needed to be tackled was that, as the number of parties to a treaty increased, it became more difficult to assess what the state of customary law was outside treaty law: in the case of widely ratified treaties, only a few States would be creating customary law. Indeed, in some instances, such as with the four 1949 Geneva Conventions for the protection of war victims, it would be virtually impossible to assess the status of customary law outside the Conventions, since there were virtually no States outside that treaty regime. In order to clarify the relationship between customary law and treaty law, the Commission should consider the classification made in 1978 by the President of the International Court of Justice, Judge Jiménez de Aréchaga, of the ways in which a treaty could interact with customary law. According to the Judge, a treaty could: have a declaratory effect of codifying existing law; have a crystallizing effect of codifying an emerging rule; and have a generating effect and represent constitutive evidence of acceptance as law, which would contribute to the formation of customary law.[237]

52. In paragraph 66 of his second report, the Special Rapporteur contended that the subjective element of customary international law had created more difficulties in theory than in practice. As the most recent of the international court judgments cited in support of that contention

[234] London Statement of Principles Applicable to the Formation of General Customary International Law, adopted by the International Law Association in its resolution 16/2000 (Formation of general customary international law) of 29 July 2000. See *Report of the Sixty-ninth Conference held in London, 25–29th July 2000*, London, 2000, p. 39. The London Statement is reproduced in *ibid*., pp. 712–777.

[235] See para. (*b*) (4) of the commentary to Part I of the London Statement.

[236] Para. 10 (*b*) of the introduction to the London Statement.

[237] E. Jiménez de Aréchaga, "International law in the past third of a century", in *Collected Courses of the Hague Academy of International Law, 1978-I*, vol. 159, pp. 9 *et seq.*, at p. 14.

dated as far back as 1970, he wondered whether there were any more recent rules of customary international law which had come into existence based on the criteria established by the International Court of Justice in the *North Sea Continental Shelf* cases in 1969. If there were, the Special Rapporteur should elaborate on how those rules had been identified and the factors that had contributed to their being identified as such.

53. In paragraph 70 of the second report, the Special Rapporteur stated that some practice might in itself be evidence of *opinio juris* or be relevant both in the establishment of the necessary practice and in its acceptance as law. However, in paragraph 74, he stated that the same conduct should not serve in a particular case as evidence of both practice and acceptance of that practice as law. As those two paragraphs were mutually contradictory, further elaboration was required to clarify the rule proposed in draft conclusion 11, paragraph 4. In order to resolve the contradiction, Mr. Kittichaisaree proposed that it be indicated that consistent State practice could prove acceptance as law and vice versa.

54. The term "international organization" in draft conclusion 2 (*b*) should be understood to cover such international entities as the General Agreement on Tariffs and Trade (GATT), the predecessor of the WTO. Second, draft conclusion 4 should specify the circumstances that were important in assessing evidence of a general practice. Third, the Special Rapporteur might address the evaluation of consensus in the context of resolutions of deliberative organs of international organizations or conferences. Although that issue was touched on in paragraph 76 (*g*) of the second report, no conclusion was offered regarding resolutions adopted by consensus.

55. Fourth, although inaction might be considered as evidence of State practice, in particular when it qualified as acquiescence, that was not always so. Silence in the absence of an obligation to speak should not necessarily imply consent. Since the manner in which international affairs were conducted differed from region to region, inaction could not be interpreted in a uniform manner. Further guidance on when inaction could be interpreted as acquiescence should be provided in the commentary. The Commission needed to elaborate criteria to answer fundamental questions about, for example, the level of inaction required, the relationship between action and inaction, and the role of the persistent objector in that context.

56. Lastly, on the weight to be given to the practice of the State when its organs did not speak with one voice, it was necessary to consider which organs had legal and/or constitutional authority to speak on a particular issue and whether the position of the organ should be taken as representing State practice for that State.

57. In conclusion, he recommended that the draft conclusions be sent to the Drafting Committee.

58. Mr. HASSOUNA said that he endorsed the "two-element" approach and approved of the careful formulation of draft conclusions 2 and 3. He concurred with the Special Rapporteur's rejection of the view that the identification of customary international law could vary according to the specific field of international law; acceptance of that view could create artificial divisions within international law as a whole. The commentary should nevertheless indicate that the respective weight to be accorded to each of the two elements could vary according to the field of international law in question.

59. Regarding draft conclusion 4, it would be helpful if the Special Rapporteur could clarify the meaning of the phrase "including the surrounding circumstances", which seemed to be subsumed by the expression "regard must be had to the context". The formulation "must be had" was too prescriptive and he proposed replacing it with "due consideration should be given".

60. With regard to draft conclusion 7, paragraph 1, it was open to question whether verbal actions constituted practice. Written or oral statements or declarations that were attributable to States undeniably played an essential role in the customary process, since they were evidence of the existence of a practice as well as of its acceptance as law. However, such assertions did not, of themselves, constitute practice. Customary norms were based on what States did, not on what they declared, even if their declarations were indispensable for knowing and understanding their behaviour.

61. The Special Rapporteur's argument, in paragraph 37, that excluding written and oral declarations from practice "could be seen as encouraging confrontation and, in some cases, even the use of force" seemed far-fetched. The scholarly contribution cited in the antepenultimate footnote to paragraph 37 in support of that argument was inaccurate. It overlooked the fact that inaction was also a form of practice, and that customary international law did not emerge from practice alone but required evidence of the acceptance of the practice as law, which was obviously not the case for the examples given in the cited article.

62. In order to avoid differences in the wording used in draft conclusion 11, which concerned *opinio juris*, and in draft conclusion 7, which concerned practice, he proposed to model draft conclusion 7 on draft conclusion 11. Accordingly, paragraphs 1 and 2, respectively, of draft conclusion 7 should begin: "Evidence of practice may take a wide range of forms" and "The forms of evidence include, but are not limited to". Such an approach would reflect the view that statements and declarations as "verbal actions" were not, in themselves, constitutive of customary norms, even if they were necessary to make sense of State practice and to provide evidence thereof.

63. With regard to draft conclusion 7, paragraph 4, he agreed that the resolutions of organs of international organizations, such as the United Nations General Assembly, could demonstrate that States engaged in a given practice and accepted it as law. However, a demonstration to that effect required a detailed elaboration of the voting procedure and the context in which the resolutions were adopted. A number of complex questions had to be addressed when the Special Rapporteur covered the practice of international organizations in greater detail in his third report: to what extent was the assumption that the practice of international organizations could be equated with that of States compatible with the legal status of

international organizations as distinct subjects of international law? How should the significance of the practice of international organizations be assessed in light of their great diversity? If the acts of international organizations served as practice, to what extent could the conduct of other non-State actors fulfil a similar role?

64. While draft conclusion 8 aptly indicated that no predetermined hierarchy existed among the various forms of practice, the Special Rapporteur's conclusion that verbal actions were a form of practice contradicted that provision. He pointed out in his second report that words could not always be taken at face value and that abstract statements alone could not create customary international law, thus implying that concrete actions took priority over statements conflicting with such actions. Other points made by the Special Rapporteur in his second report revealed a need to review and redefine the concept of hierarchy, such as his recommendation to give greater weight to the practice of intergovernmental organs of international organizations than to their secretariats, or his proposal that, where the organs of a State did not speak with one voice, the voice with the power to act in external affairs should be treated as representing the State in its practice.

65. Although draft conclusion 9 was in line with international and national judicial decisions regarding the generality of practice, evaluating whether a practice was "sufficiently general and consistent" or whether a State was "specially affected" would pose a challenge to those called on to identify customary rules. Consequently, it would be helpful if practitioners had access to as many examples of judicial decision-making as possible. The many examples cited in the footnotes of the second report would benefit from a more expansive discussion in the commentary to the draft conclusion. In view of the rule set out in paragraph 3, and as confirmed by the International Court of Justice in the *North Sea Continental Shelf* cases, he proposed that assertions of the spontaneous creation of customary rules, or what had frequently been referred to as "instant custom" in the literature, be mentioned in the commentary to the draft conclusion, along with some examples.

66. As to draft conclusion 10, paragraph 1, he proposed that the formulation "accompanied by a sense of legal obligation" be replaced by "derived from a sense of legal obligation".

67. The current formulation of draft conclusion 11, paragraph 4, needed further clarification since, by analogy with the view reflected in draft conclusion 7, paragraph 1, that practice included verbal actions, paragraph 4 could be read as implying that abstract statements might be sufficient to provide evidence of the two elements necessary for the formation of customary international law. Yet, as acknowledged in the second report, such statements could not, of themselves, create law.

68. With regard to the Commission's future programme of work, he welcomed the Special Rapporteur's suggestion, in paragraph 83 of his second report, that the draft conclusions should be accompanied by indications as to where and how to find practice and *opinio juris*. The Commission could supplement its 2013 request to States for information[238] by asking about digests and other national publications that might contain evidence of practice and *opinio juris*. It could also renew its initial request for information on State practice relevant to the formation of customary international law,[239] given the limited number of written replies it had received on that major topic: only nine at the time of the writing of the second report. Such a dearth of replies posed a major challenge to the Commission's work, since the formation of customary international law was primarily the province of States, and their practice should be determinative.

69. He recommended referring the 11 draft conclusions to the Drafting Committee.

70. Mr. KAMTO said that the development of a rule of customary international law was a complex process that was not always easy to understand, and had even been described as "mysterious". In paragraph 12 of his second report, the Special Rapporteur stated that "the customary process [was] inherently flexible", which raised the question whether there was any merit in making it more rigid, and if so, within what parameters such an objective should be met. The identification of customary international law was at once a process and a result, and he agreed with the Special Rapporteur on the adoption of the "two-element" approach. The key question was how to determine the critical moment at which a practice became an enforceable rule of customary international law. The participants in the process could not answer that question, since, as practice showed, they were rarely in agreement as to the precise moment at which a rule of customary law that applied to them had been created. On the contrary, the invocation by State A of a rule of customary international law with respect to State B tended to elicit controversy and doubt as to State B's acceptance of State A's normative finding.

71. What the literature appeared to have lost sight of, when it came to the identification of a rule of customary international law, was the intervention of a third party: the judge or the codifier. The judge's power of discovery or even creation of a customary rule was very real; he or she could not only formulate a rule but could also refuse to transform a practice into a rule of customary international law.

72. The wording of rulings by the International Court of Justice raised questions about whether the judges always espoused the "two-element" approach, especially in cases relating to international humanitarian law. For example, in paragraph 79 of its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court stated that the fundamental rules of international humanitarian law "are to be observed by all States … because they constitute intransgressible principles of international customary law". That was clearly a case of judicial identification of a rule of customary law, but one could not say for certain that the identification had come about through the application of the "two-element" approach. Hence the need, as the Special Rapporteur pointed out in paragraph 30 of his second report, for caution and balance—including in the wording of the draft conclusions.

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[238] See *Yearbook … 2013*, vol. II (Part Two), p. 15, para. 26.

[239] See *Yearbook … 2012*, vol. II (Part Two), p. 13, para. 29.

73. With regard to the substance of the second report, he wished to point out, first, that the Special Rapporteur's explanations and justifications were somewhat laconic and did not sufficiently substantiate his conclusions. In paragraph 14, for instance, he indicated merely that the work on the topic was without prejudice to questions relating to *jus cogens*, which could be the subject of a separate topic, without specifying who would address that topic or in what context it would be considered.

74. Second, in paragraph 18 of his second report, the Special Rapporteur indicated that a broad definition of "international organization" would seem desirable. However, that contradicted draft conclusion 2 (*b*), where "international organization" was defined as an "intergovernmental organization", a definition that was relatively restrictive when compared with the one contained in the articles on the responsibility of international organizations.[240]

75. Third, in paragraphs 37 and 38 of his second report, the Special Rapporteur stated that verbal acts could be considered a manifestation of practice—an idea that was substantiated considerably better by the literature than by case law. That point gave rise to three questions: was it necessary for a verbal act to be transferred to a physical medium in order to be taken into account as practice? Did a verbal act have to be repeated in order to be considered a form of practice? Could one actually identify a general practice if it was solely verbal?

76. Fourth, the Special Rapporteur indicated in paragraph 41 (*b*) of his second report that acts of the executive branch could include "positions expressed by States before … international courts and tribunals". Those positions should be treated with caution, however. The arguments put forward in the written and oral pleadings of States were governed by the dictates of the international litigation in question, and each party's aim was to advance winning arguments. Moreover, a Government might not even be aware of the arguments formulated by its own counsel. The latter had been known to advance arguments that were not consistent from one case to another or that contradicted their own previously published writings.

77. Fifth, in paragraph 55 of his second report, the Special Rapporteur stated that, for a rule of customary international law to become established, the relevant practice must be consistent. He failed to mention, however, that it should also be uniform. In fact, in paragraph 57 of his second report, he contended that complete uniformity of practice was not necessary, citing paragraph 186 of the 1986 judgment by the International Court of Justice in the *Military and Paramilitary Activities in and against Nicaragua* case. However, the cited passage did not seem pertinent to the contention that uniformity of practice was not required in the formation of customary international law. The Court merely indicated, *inter alia*, that in the practice of States, the application of the rules in question was not expected to be perfect—but that did not at all invalidate the requirement for the practice to be uniform. Rather, the cited passage assumed that the custom-formation process had reached a stage where a rule had already been established. In keeping with the settled case law of the Court, as cited by the Special Rapporteur himself, one of the requirements for the existence of a rule of customary international law was precisely a constant and uniform practice. There was consequently no clear precedent in case law for not using the term "uniform".

78. With regard to draft conclusion 1, paragraph 1, he concurred with Mr. Candioti's warning against replacing the word "methodology" with "rules". Doing so would change the entire nature of the Commission's work on the topic; its aim was not to lay down strict secondary rules for determining the existence of rules of customary law but rather to guide practitioners and scholars in understanding the formation of custom. A more radical solution would be to delete the paragraph altogether, or to include it as part of the commentary to the draft conclusion.

79. In keeping with his observation that the "tw[o-element" approach did not always seem to be applied when an international court or tribunal declared that a rule of customary international law existed, he proposed that draft conclusion 1, paragraph 2, be reformulated to read: "The present draft conclusions are without prejudice to other ways of identifying a rule of customary international law as well as to methods relating to other sources of international law and questions relating to peremptory norms of international law (*jus cogens*)" ["*Les présents projets de conclusion sont sans préjudice d'autres modes de détermination d'une règle de droit international coutumier ainsi que des méthodes concernant d'autres sources du droit international et les questions relatives aux normes impératives de droit international (jus cogens)*"].

80. With regard to draft conclusion 2 (*a*), the use of the expression "that derive from and reflect a general practice accepted as law" was neither explained nor substantiated in the analysis that preceded the draft conclusion. The use of the two expressions "derive from" and "reflect" created confusion; he was therefore in favour of keeping only the former. A more radical solution would be the deletion of the paragraph.

81. In draft conclusion 5, the expressions "means that it is primarily the practice" and "the creation, or expression, of rules" were ambiguous; the second gave the impression that, while in some cases a customary rule was created, in others it was expressed, thereby implying its prior existence. As an alternative, he proposed a simpler formulation, to read: "The requirement, as an element of customary international law, of a general practice means that such a practice contributes to the creation of rules of customary international law" ["*L'exigence d'une pratique générale en tant qu'élément du droit coutumier signifie qu'une telle pratique contribue à la formation de règles de droit international coutumier*"].

82. In draft conclusion 8, paragraph 2, the second sentence implied that, although less weight was to be given to contradictory practice within a given State, some weight would nevertheless be given to it. That raised the question of which of the various trends in such practice would

[240] See the draft articles on the responsibility of international organizations adopted by the Commission at its sixty-third session and the commentaries thereto in *Yearbook … 2011*, vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

be selected as evidence. In the hypothetical situation in which the Head of State and the Parliament held opposing views, yet both had authority in a given area, it would be difficult to decide whether to favour the practice of one or the other in determining the existence of a customary rule. For that reason, he proposed the reformulation of the second sentence to read: "No account is to be taken of the contradictory practice of the organs of the State" ["*Il ne sera pas tenu compte de la pratique contradictoire des organes de l'État*"].

83. He proposed to replace the existing title of draft conclusion 9 with "General practice must be consistent and uniform" ["*La pratique générale doit être constante et uniforme*"], which was in line with the settled case law of the International Court of Justice in that area. In paragraph 1, it would be better, in the French version, to replace the word *forcément* with *nécessairement*. Paragraph 2 was unnecessary since it reproduced, with less appropriate wording, the title of the draft conclusion. It should be deleted altogether or else replaced with wording that explained what was meant by practice that was consistent and uniform.

84. Lastly, with respect to draft conclusion 9, paragraph 4, he shared the concerns expressed regarding the phrase "the practice of States whose interests are specially affected". From paragraph 54 of the second report, it emerged that, apart from the judgments in the *North Sea Continental Shelf* cases, references to the concept of the specially affected State appeared only in separate or dissenting opinions or in the work of certain authors. In his own view, acceptance of the concept of specially affected States would compromise the principle of the sovereign equality of States. If the Commission decided to retain a reference to the concept, it was essential for the Special Rapporteur to explain it in a detailed and thorough fashion in the commentary to paragraph 4.

85. He was in favour of referring the draft conclusions to the Drafting Committee.

The meeting rose at 1 p.m.

3226th MEETING

Thursday, 17 July 2014, at 3 p.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Identification of customary international law (*continued*) (A/CN.4/666, Part II, sect. D, A/CN.4/672)

[Agenda item 9]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. ŠTURMA said that the Special Rapporteur's well-documented second report (A/CN.4/672) would be useful not only to the Commission and Member States but also to law students. "Methods" rather than "methodology" would be the best term to describe the process of determining the existence and content of rules of customary international law, since the expected outcome of the topic was methods or guidelines for practitioners.

2. The language of the definition contained in draft conclusion 2 justified the two-element approach outlined in chapter III of the report and reflected in draft conclusion 3 and the following conclusions. General practice and *opinio juris* both had a role to play, although the emphasis placed on either component would vary in different areas of international law.

3. As he read draft conclusion 5, it did not exclude the practice of international organizations. He could agree to draft conclusion 6, on the understanding that it covered State organs and other entities within the meaning of articles 4 and 5 of the articles on responsibility of States for internationally wrongful acts,[241] but not all cases of conduct attributable to a State for the purpose of responsibility. He concurred with the approach adopted in draft conclusion 9. The time element might, however, deserve a separate conclusion, because the statement that "no particular duration is required" might or might not be correct, depending on circumstances. The distinction drawn by René-Jean Dupuy between *la coutume sauvage* and *la coutume sage* had merit, in that it clarified the interrelationship between practice and the expression of *opinio juris* in light of different circumstances and the pronouncements of States at international conferences and in international organizations.[242]

4. He was in favour of the wide range of forms of practice referred to in draft conclusion 7 and the lack of a predetermined hierarchy of those forms. It was noteworthy that, in the decision taken by the Supreme Court of the Czech Republic in 2004, to which reference was made in paragraph 24 of the second report, the Court had used as evidence for its findings the writings of international jurists and had discussed the distinction between customary international law and international comity.[243] The current topic should also encompass the relationship between customary international law and general principles of law, usages and international comity. The Special

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[241] General Assembly resolution 56/83 of 12 December 2001, annex. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

[242] R.-J. Dupuy, "Coutume sage et coutume sauvage", in *Mélanges offerts à Charles Rousseau*, Paris, Pedone, 1974, pp. 75–87.

[243] *Diplomatic Privileges and Immunities of a Visiting Prince Case*, Czech Republic Supreme Court, No. 11 Tcu 167/2004, *International Law Reports*, vol. 142 (2011), p. 186.

Rapporteur should perhaps examine the role of writings of publicists in identifying elements of international custom. Lastly, the role of international organizations and international courts in the formation of customary international law seemed to be indisputable.

5. He recommended the referral of all the draft conclusions to the Drafting Committee.

6. Mr. HUANG endorsed the many favourable comments made on the Special Rapporteur's second report and said that all 11 draft conclusions should be referred to the Drafting Committee. However, he was not in favour of extensive quotes from the judgments of the International Court of Justice in statements during plenary debates, as it gave the impression that the Commission relied too heavily on such judgments instead of on the opinions of its members.

7. He agreed with the aim of the topic as outlined in paragraph 12 of the second report. The Commission should base its work on current international practices relevant to the practical needs of the international community. It should avoid purely academic debate and devise uniform criteria which could be used, by all audiences, to identify elements of practice in all fields of customary international law.

8. The constituent elements of customary international law formed the core of the topic. He agreed with the Special Rapporteur's two-element approach, which was substantiated by State practice and national and international judicial practice. Customary international law could be compared to a human being, with general practice forming the body, and *opinio juris,* the soul: in other words, both elements were vital.

9. General practice, shared by many countries, had to be widespread and consistent. While practice by a State or an organization could take a variety of forms, with no predetermined hierarchy, it had to satisfy certain conditions in order to serve as evidence of general practice. First, it had to be lawful, compatible with the relevant laws and legal procedures. It was to be hoped that this requirement would be taken into consideration in the wording of draft conclusion 6.

10. Second, any individual practice used as evidence of a general practice had to be of relevance to that general practice. Third, a practice must be public; secret or undisclosed practices could not be considered evidence of valid practice. Fourth, there had to be internal consistency: the practices of different State bodies had to be consistent. The Special Rapporteur's treatment of that point in paragraph 50 of the second report and in draft conclusion 8, paragraph 2, left much to be desired. In order to serve as evidence of customary international law, State practice had to be the authoritative and effective practice of the State concerned. He hoped that all those facets would be addressed in the commentary.

11. Turning to *opinio juris* on whether a general practice constituted customary international law, he said that it had to be that of several States. Evidence of such *opinio juris* could take various forms, including inaction. The burden of proof of *opinio juris* was borne by the party which claimed that a certain practice was part of customary international law.

12. He disagreed with those members who had argued that a single practice could not be used as evidence of both general practice and *opinio juris*. Lastly, while the attempt by some scholars to devise alternatives to the two-element approach had some merit for the purposes of academic study, that method could not be recommended to the Commission, which should continue to base its deliberations on both general practice and *opinio juris*.

13. Mr. HMOUD thanked the Special Rapporteur for his well-researched and well-balanced second report. The utility of the project was clear, since in many instances, the lack of clarity in the methodology of identification created doubts about the customary nature of a certain rule. Accordingly, the current project must devise a useful tool that would assist in identifying the elements of a rule of customary international law and the relevant evidence to be utilized in the identification process.

14. The definition of customary international law should be based on Article 38, paragraph 1 *b*, of the Statute of the International Court of Justice, which offered a simple, sufficiently flexible definition. The phrase "derive from and reflect", in draft conclusion 2, highlighted the fact that general practice and acceptance as law were both constitutive and declaratory of the rules of customary international law.

15. It was well settled that a rule of customary international law encompassed two separate elements: the objective element of practice and the subjective element of acceptance of the obligatory nature of the practice. To adopt a one-element approach would neither advance the process by which rules of customary international law were formed nor make evidence more usable for the purpose of identification. Moreover, there was no plausible argument in favour of using different approaches to identification depending on the field of law, although the emphasis placed on an element might depend on circumstances and on the context and nature of the evidence available.

16. Turning to the role of practice, he said it was solely the practice of States that created the rules of custom; the practice of international organizations should be consulted only in the contact of evidence, not creation, of a rule. The fact that a State might confer some competences on an international organization did not mean the latter then acted on its behalf in creating customary law. For the purpose of identifying customary international law, attribution of an act to a State did not have to meet the high threshold established in the articles on responsibility of States for internationally wrongful acts.

17. As far as draft conclusion 7 was concerned, he concurred with the non-exhaustive list of sources in paragraph 2 and with the notion that State practice comprised verbal as well as physical conduct, along with various forms of intergovernmental communication. It might be necessary to provide guidance as to the type of verbal conduct that represented practice. As to whether confidential internal memorandums by State officials could

be regarded as a manifestation of practice, they seemed instead to fall into the category of the subjective element of "acceptance as law".

18. Draft conclusion 7, paragraph 2, referred to "[m]anifestations" of practice, although that word was more closely linked to evidence than formation. He therefore suggested that the paragraph should begin with the phrase "Practice and its manifestations include". The issue of inaction had to be treated with caution, and a distinction must be drawn between inaction as conduct, which was an objective element, and inaction representing acquiescence, a subjective element.

19. Draft conclusion 7, paragraph 4, should be recast to indicate that acts "in the context of international organizations" could serve as practice, in order to make it plain that it was only State practice through the organization, and not the practice of an international organization itself, that constituted the relevant practice.

20. Regarding draft conclusion 8, while there was no hierarchy of forms or of evidence of State practice, more emphasis should be given to practice by an organ of the State that was closely associated with the content of the customary rule. Concerning draft conclusion 9, it was well established that practice had to be general, but not necessarily universal, and consistent. Frequency or repetition of practice, in addition to generality and consistency, should be borne in mind, hence the time element should receive greater emphasis.

21. There was ample evidence from the pronouncements and decisions of courts that the practice of specially affected States had to be given due weight. That proposition did not conflict with the principles of generality of practice or the equality of States, provided that the practice was accepted by the community of States as a whole. The quote in the last footnote to paragraph 54, to the effect that the "major Powers" would often be "specially affected by a practice", seemed to suggest that the participation of the major Powers was essential for the formation of rules of customary international law, and that was worrisome. Fortunately, that idea had not been incorporated into the draft conclusions, and it was to be hoped that it would not find its way into the commentaries.

22. The phrase "acceptance as law" was the proper term and, unlike "*opinio juris*", it had a precise connotation. Such acceptance was what distinguished custom from usage and the discretionary acts of States. If the draft conclusions were to serve as a useful guide for practitioners, they should better explain how to differentiate between practice that was accepted as binding and other forms of States usage. Evidence of acceptance, as described in draft conclusion 11, would of course form the factual basis for doing so. As that evidence was also proof of the practice itself, it would be necessary to find a method for determining whether evidence was relevant as proof of practice, or of acceptance, and for deducing the subjective element.

23. Mr. NOLTE thanked the Special Rapporteur for his excellent second report, which went in the right direction. The report and the debate on it had, however, raised such a quantity of fundamental questions of international law that it would normally take several years to address all of them, in all their complexity. It seemed impossible that the Commission would be able to articulate a reasoned position on all the questions raised in the time that was available.

24. Concerning draft conclusion 1, he was uncomfortable with the terms "methodology" and "method", since the topic was about much more than a method: it concerned the secondary rules regarding the formation and determination of customary international law. He therefore suggested that draft conclusion 1 be reformulated to read:

> "The present draft conclusions concern the elements of customary international law and the factors which need to be taken into account for determining the existence and content of such rules."

25. It was not sufficient to deal with other sources of international law by means of a "without prejudice" clause. That was true, in particular, of general principles of law, since they might be relevant for determining the content of particular rules of customary international law, and vice versa. For that reason, he suggested the addition of a draft conclusion, or paragraph, based on article 31, paragraph 3 (*c*), of the 1969 Vienna Convention, to read:

> "In identifying rules of customary international law, account is to be taken of general principles of international law."

26. With regard to draft conclusion 2, he agreed that customary international law consisted of two elements, but thought it would be wise to add the expression "*opinio juris*" in brackets after the phrase "accepted as law", to show that the latter term meant a common positive attitude on the part of the stakeholders of the international legal system. He did not think the Commission should attempt to define "international organization" during the current session.

27. The draft conclusions should be formulated in a way which did not suggest that general practice must come first and then be accepted as law. To make that clear, draft conclusion 3 could be worded to say that it was necessary to ascertain "whether there is a general practice and whether it is accepted as law". He welcomed the Special Rapporteur's openness to the idea that the two-element approach could be applied differently in different fields, since types of rules might vary according to dissimilar forms of evidence, the availability of which might differ greatly depending on the nature of the rule.

28. The reference to the "surrounding circumstances" hardly added anything to draft conclusion 4, which should emphasize that the assessment of the evidence must take account of the factual context and normative considerations.

29. As for draft conclusion 5, the practice of States contributed primarily, but not exclusively, to the formation of customary international law. The word "formation" captured the process by which customary law came into being better than "creation".

30. He doubted whether the implicit reference to the articles on responsibility of States in draft conclusion 6 was appropriate, because the primary purpose of those articles

was to identify and attribute responsibility for internationally wrongful acts. It was also questionable whether it was necessary to add that the relevant conduct could be "in the exercise of executive, legislative, judicial or any other function". If such an addition were considered useful, he suggested the insertion of the word "public" before "any other function". In draft conclusion 7, paragraph 1, the word "verbal" should be replaced with "communicative", because non-verbal communication also played a role in that context. In paragraph 2, a generic reference to internal forms of conduct should be inserted. The forms of practice listed in paragraph 3 had been insufficiently explored, and it would therefore be wise not to include them in the text until the underlying issues were addressed in the Special Rapporteur's third report.

31. Turning to draft conclusion 8, he agreed that practice must be unequivocal and consistent, even if that meant that it was sometimes hard to identify the position of democratic States which might speak with many voices. Taken in isolation, draft conclusion 9 might be misread to mean that practice alone could establish a rule of customary international law. Paragraph 1 should therefore begin by saying "The relevant practice, as an element of a rule of customary international law, must be general". The expression "*opinio juris*" should be added at the end of draft conclusion 10, paragraph 1, to highlight the need for the subjective element of customary international law. It would also be wise to reflect in the draft conclusion the Special Rapporteur's explanations of the need to cover the subjective element of customary international law.

32. He generally agreed with draft conclusion 11, although he doubted whether internal memorandums and other internal communications should be recognized as evidence of *opinio juris*. The relevance of inaction should not be addressed without the benefit of the Special Rapporteur's third report.

33. In closing, he said that the Drafting Committee should take the necessary time to digest and evaluate the proposed draft conclusions.

34. Ms. ESCOBAR HERNÁNDEZ thanked the Special Rapporteur for having submitted a second report of such great interest. She would confine herself to comments about the draft conclusions contained in the second report. First, she said that the contents of draft conclusion 1, paragraph 1, were adequate for the purpose outlined in paragraph 12 of the second report. While she agreed with the general tenor of paragraph 2, it would be difficult to avoid entering into general principles of law, and how to discern them, when discussing the method for identifying the existence and content of international custom.

35. As for draft conclusion 2, she did not believe that the Commission should define either customary international law or an international organization, since they were sufficiently well-known and clear-cut categories. With regard to the definition of "international organization", she considered that to define it as "an intergovernmental organization" was a reductionist approximation that was not appropriate. Moreover, the Special Rapporteur had not explained sufficiently why he had departed from the definition of an international organization as contained in the articles on responsibility of international organizations.[244] Furthermore, if the Special Rapporteur wished to define the concept of "international organization", she wondered why "State" had not been defined, given the importance which the Special Rapporteur attached to State practice in the context of the topic. In short, the definitions contained in the draft conclusion were unnecessary and potentially dangerous.

36. She supported the Special Rapporteur's "two-element" approach as reflected in draft conclusion 3. A balance between the two should be maintained throughout the draft conclusions. However, the phrase "accepted as law" might give rise to uncertainty about whether one or both elements had to exist, and it should therefore be replaced with "and *opinio juris* thereon", since the latter was the term normally used by States, national and international courts and learned writers. The focus on the two elements of practice and *opinio juris*, which were, indeed, sometimes difficult to separate, was not uniform throughout the second report. The relationship between the two could have major practical implications and therefore deserved closer attention.

37. In draft conclusion 5, she had no problem with the word "primarily", since State practice was the main, but not the sole source of "general practice". The action or inaction of international organizations was also of relevance to the establishment and identification of custom. Given that the Special Rapporteur had announced that he would deal with the practice of international organizations in his third report, the Commission should examine that issue the following year, at which point the Drafting Committee might have to revise some of the draft conclusions proposed in the second report.

38. She agreed that the bald reference to "inaction" in draft conclusion 7 was inadequate. Inaction in itself could not be automatically deemed a relevant practice. Inaction must be assessed in light of the surrounding circumstances and with special regard to whether the State could reasonably have been expected to act. Moreover, in that regard, the Commission's parallel debate on subsequent agreements and subsequent practice in relation to the interpretation of treaties might well provide some guidance.

39. The use of the term "hierarchy" in draft conclusion 8 raised major problems. First, the acts and omissions under consideration were highly diverse and were not amenable to ranking. Second, it was important to take due account of the nature and rank of the State body taking or failing to take a given action: an act of the Ministry for Foreign Affairs was not comparable with the action of a local mayor, nor was an act of a trial court comparable with a Supreme Court ruling. In addition, the specific circumstances giving rise to a practice or custom needed to be taken into account in evaluating the status of a given form of practice or a given act. Contrary to the implication conveyed by paragraph 50 of the second report, the relationship of sub-State organs

[244] See the draft articles on the responsibility of international organizations adopted by the Commission at its sixty-third session and the commentaries thereto in *Yearbook … 2011*, vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

to State organs—for example in a federal State—was based on competencies, and was not comparable with the relationship between higher and lower courts, which was strictly hierarchical.

40. She was not fully convinced that, where the organs of the State did not speak with one voice, less weight should be given to their practice. Although it was true that such practice could not have the same significance as uniform practice, the complexity of a State's structure, for example, and the impact of the separation of powers, must be taken into account. A lack of unanimity might equally be evidence of the non-existence of custom, something which was also part of the process of identifying rules of customary law.

41. In draft conclusion 9, paragraph 1, she considered the term "sufficiently" to be both superfluous and problematic. It introduced a subjective element by necessitating the evaluation of whether a practice was widespread and representative enough to be considered general. It would therefore be preferable to delete the term "sufficiently". Paragraph 1 should instead refer to the need for practice to be continuous and uniform.

42. With regard to draft conclusion 9, paragraph 4, she did not dispute the fact that the practice of specially affected States must be taken into account and even had special significance. However, it could not constitute the decisive—and certainly not the sole—criterion in establishing the existence of general practice, and still less, of *opinio juris*. Giving critical weight to the practice of affected States could enable them to impose their interests, as a group, on others. While that might not be a problem within regions or in bilateral relations, it could conflict with the principle of sovereign equality when the establishment of general practice was involved.

43. In conclusion, she pointed out that, in Spanish at least, the use of certain expressions, such as "physical and verbal actions" [*actos físicos … verbales*] and "conduct …'on the ground'" [*conducta … 'sobre el terreno'*], might be questionable. However, it would be better to discuss those matters in the Drafting Committee.

44. Mr. WISNUMURTI, referring to draft conclusion 2 (*a*), said that a working definition of customary international law was needed in order to clarify the overall context of the draft conclusions. He agreed with Mr. Park that "*opinio juris*", which was the term most commonly used, should be added in brackets after the words "accepted as law".

45. In draft conclusion 4, the words "context" and "surrounding circumstances" were unclear and could give rise to varying interpretations, lessening their usefulness to those responsible for assessing evidence that a general practice could be accepted as law.

46. In draft conclusion 6, the words "or any other function" unnecessarily broadened the scope of the draft conclusions and could create confusion. It was not clear, for example, whether they referred to the conduct of *de facto* organs of a State, mentioned in paragraph 34 of the second report.

47. In draft conclusion 7, paragraph 3, the notion of inaction needed clarification. He was not convinced that applying draft conclusion 9, paragraph 2, of the Commission's work on subsequent agreements and subsequent practice in relation to the interpretation of treaties, *mutatis mutandis*, as proposed by Mr. Murphy, would solve the problem. That paragraph dealt with silence on the applicability of a subsequent agreement or a subsequent practice, while draft conclusion 7, paragraph 3, of the topic under consideration dealt with the interpretation of inaction or silence in the context of conduct that would form State practice.

48. The arguments in the second report underpinning draft conclusion 7, paragraph 4, on the role of international organizations, lacked clarity. A case in point was paragraph 44. To equate an act of an international organization such as the European Union with that of a State was to oversimplify. If the acts of international organizations were to be included as a form of practice, the Commission would need to look into the complex structures and mandates of various international organizations. That could present difficulties.

49. Draft conclusion 8, paragraph 2, could be viewed as contradicting paragraph 1 and was too prescriptive in nature. The element of flexibility and the weighing of evidence of practice on a case-by-case basis, should be reflected in paragraph 2. He supported the proposal to merge draft conclusion 8 with draft conclusion 4.

50. Draft conclusion 9 could be drafted more efficiently, notably with respect to the adjectives "general", "widespread", "representative", "universal" and "consistent", which were used variously to set out the conditions required for establishing a rule of customary international law. Like other colleagues, he had reservations with regard to paragraph 4, on the need to pay due regard to the practice of States whose interests were specially affected, especially in relation to the principle of sovereign equality of States.

51. In draft conclusion 10, paragraph 1, the words "the practice in question must be accompanied by a sense of legal obligation" did not seem to sufficiently clarify the meaning of "accepted as law" or *opinio juris*. He suggested replacing those words with "the practice in question must be accepted as a legal obligation".

52. His comments on draft conclusion 7 were applicable to draft conclusion 11, which closely paralleled it. The wording of the two texts should be harmonized, however.

53. With those comments, he was in favour of sending all 11 draft conclusions to the Drafting Committee.

54. Mr. NIEHAUS said that as the work progressed, the Commission might well decide that draft conclusion 2 was unnecessary. Nevertheless, he himself was inclined to retain it, and in particular, to adhere as far as possible to the definition of customary international law set out in the Statute of the International Court of Justice. Moreover, further terminological definitions would probably be required. As to draft conclusion 4, he suggested that the Drafting Committee find a fuller and clearer wording that would do justice to the contents of paragraphs 29 to 30 of the second report.

55. The title of draft conclusion 5, "Role of practice", was not very clear, at least in Spanish (*Función de la práctica*). In order not to minimize the importance of the practice of international organizations in the formation of customary international law, he suggested that, rather than saying "it is primarily the practice of States" that contributed to that process, it might be better to say simply that it was the practice of subjects of international law that contributed to the creation of customary international law.

56. In draft conclusion 6, the expression "any other function" was too general and thus did not properly reflect the contents of paragraph 34 of the second report. To some extent he shared Mr. Murphy's view that draft conclusion 6 was too broad and should be more restrictive. That could be achieved by using the expression "conduct authorized" by a State, for example. In addition, he suggested that "Relevant practice" would be a more appropriate title than "Attribution of conduct".

57. In draft conclusion 7, paragraph 2, it would be much clearer to say "Forms of practice" instead of "Manifestations of practice". As to paragraph 3, he shared the view that greater clarity was needed over the meaning of "inaction". What would be the minimum level of inaction? Did silence constitute inaction in and of itself or only when the circumstances required action?

58. In draft conclusion 10, paragraph 1, he agreed that, in addition to "a sense of legal obligation", a reference to lawfulness should be included.

59. Ms. JACOBSSON said that, like others, she believed that the Commission's future work on customary international law should address the questions of who was involved in assessing evidence of a rule of customary law and who bore the burden of proof. They were not difficult questions to answer where a court or tribunal was doing the assessment, but when it was a State, things became more complex. In attempting to identify a rule of customary law, the State might either be trying to evaluate whether such a rule definitely existed, or else it might want to contribute to the firm establishment of an emerging rule.

60. The status of a rule of customary law was not black and white. Nor did all States need to agree on its existence or on the exact parameters of its content. There was also a temporal element to be taken into account: in some situations, uncertainty might disappear overnight. That had happened with the ban on the use of chemical weapons in response to an attack using chemical weapons—the so-called "reciprocity option". Up to the time of the chemical weapons attack in Syria, in August 2013, a tiny element of uncertainty had remained; however, after the attack, States had revealed their clear legal assessment that there were no situations when chemical weapons might be used, even in response to a chemical-weapon attack.

61. Referring to draft conclusion 2, she said that she was not convinced that a definition of the term "customary international law" was needed. The text stated that the proposed definition was for the purposes of the draft conclusions, which clearly indicated that there might exist another, differently defined "customary international law". That was confusing, however, since the Commission's aim was to address the identification of customary international law in all situations, not to define it at a given time and for a given purpose. Any decision on whether to retain the definition would need to address whether or not to diverge from the wording of Article 38, paragraph 1 *b*, of the Statute of the International Court of Justice. The most important argument in favour of that definition was that it was a well-established and well-recognized formulation. She could also see the merit in inserting a reference to *opinio juris*.

62. She doubted the need for a broader definition of "international organization" than the one given in the articles on responsibility of international organizations. The perception of what constituted an international organization might change in the future, even if the proposed definition might seem acceptable today.

63. Draft conclusion 4 would not give practitioners clear guidance as it stood. Examples of "surrounding circumstances" would be best spelled out in the draft conclusion rather than the commentary.

64. Turning to draft conclusion 5, she said that customary international law could be created simultaneously by international organizations and States: on occasion, it might even be difficult to separate them in terms of their involvement. A legally binding decision on sanctions and enforcement measures taken by the European Union, for example, was most often preceded by lengthy consultations on what the individual States were or were not entitled to do under international law. As the competence—often the exclusive competence—of the European Union had expanded, it had become difficult to distinguish the expression of a customary international law of the European Union from that of its individual member States. The practice of an international organization like the European Union could thus not be described solely as the view of that organization on customary international law; it might also be equivalent to State practice.

65. Draft conclusion 6 should be read in light of draft conclusion 8, especially since no distinction was made between the various institutions of the State and their place in the national hierarchy.

66. In draft conclusion 7, she particularly appreciated the inclusion of verbal actions. If they were not included, only the practice of those States with the economic and political power to act physically would count as State practice. Given that inaction could be misinterpreted as consent—and that was one of the reasons that "inaction" would need careful handling—verbal actions could make a crucial contribution to the establishment or estoppel of a rule of customary law.

67. Caution was required before admitting all "correspondence" between States—which would include, for example, non-papers—as a form of practice of a State. The same applied to "official publications". It was important to be aware of the domestic status of such documents.

68. Draft conclusion 9 seemed to assume the existence of an entity capable of establishing a rule of customary

international law and assessing State practice. While a court might be in a position to do so, that did not mean the court's assessment was a correct assessment. The Government might take a different position on a matter of international law. Courts were bound by their own jurisdiction and regulations, and caution was therefore needed in relying on domestic court cases when attempting to define the process of formation of customary international law.

69. She agreed with Mr. Caflisch that the word "widespread", in paragraph 1 of draft conclusion 9, should be deleted, partly because it had no normative function, but also because it seemed to dismiss regional practice as less relevant. Concerning paragraph 4, clearly the practice of specially affected States was important, but the Commission's conclusions should reflect the fact that it was not easy to identify such States.

70. In draft conclusion 11, paragraph 2, she had no problem with the non-exhaustive list of forms of evidence, but she was concerned that the wording might be unclear to readers who did not have the Special Rapporteur's background analysis in mind. For example, what did "action in connection with resolutions of organs of international organizations and of international conferences" or "official publications in fields of international law" mean? Not every such publication could be interpreted as a pronouncement by the Government. The report of a government committee, for example, was published by the Government but did not necessarily reflect the Government's views. Similarly, a parliament's view on what it considered to be a binding rule of international law could not necessarily be attributed to the State, and indeed the Government might take a different position.

71. Lastly, she said that she supported the future programme of work as outlined in chapter VI of the second report.

72. Mr. SABOIA said that in removing the reference to "formation" from the title of the topic, the Commission had agreed to aim at a practical outcome for a non-expert practitioner. There had nevertheless been an understanding that the Special Rapporteur would make some reference to elements relating to the formation of customary international law. He saw few such references in the second report, and suggested that the Special Rapporteur address the question in his future reports.

73. Although State practice was the major source of evidence of general practice, he did not consider non-State actors to be of negligible importance in the establishment of customary international law. In that regard he favoured retaining the words "surrounding circumstances" in draft conclusion 4, as well as retaining draft conclusion 7, paragraph 4. While it was true that resolutions and decisions taken by international organizations were the acts of States, they were taken in accordance with the constitutive instruments of those organizations, and in a concerted and interactive manner that was by no means the same as the decision-making process in individual States. He nevertheless agreed with Mr. Forteau on the independent nature of international organizations as subjects of international law, and with Ms. Jacobsson on the need to retain the definition of "international organization" given in the articles on responsibility of international organizations.

74. The role of non-State actors in the formation of customary international law deserved more emphasis than it had been given. Indeed, some of the radical changes to customary international law since the Second World War had been brought about by non-State actors in response to necessity and in spite of—or even in opposition to—State practice. Notable examples were decolonization, the recognition of national liberation movements, the incorporation of self-determination as a right of peoples under customary international law, the recognition of the legality of the use of armed force in fighting colonialism and apartheid, and indeed the evolution of the position of the International Court of Justice; in that last regard, he shared the view that the Commission should be careful not to show undue reliance on the judgments of the Court.

75. Another example of the way in which customary international law had developed was international humanitarian law, in which bodies such as ICRC, and even prominent individuals, had played a pivotal role in creating and developing institutions and rules relating to the protection of individuals in armed conflict. Similarly, in the law of the sea, unilateral acts by States, which initially ran counter to the prevailing rule, had formed the basis of a new regime governing the seas and the continental shelf.

76. He agreed with Mr. Huang that, if practices were contrary to peremptory rules or treaties or the Charter of the United Nations, they should not be considered as lawful practice for the purpose of forming customary international law. On the other hand, customary international law was evolutionary by nature: if practice came to supersede a customary rule, then that was part of that evolutionary process. Whereas in the past, practice, repetition and *opinio juris* might combine in a process that could take centuries, in an age of advanced communications technologies, the formation of custom through the medium of international organizations might take less than one generation. That was an example of the transformation of law as a result of change in the social substratum.

77. Mr. SINGH said that he was in favour of deleting draft conclusion 1, paragraph 2.

78. It was not clear why the list in draft conclusion 7, paragraph 2, mentioned "statements on behalf of States concerning codification efforts" but left out the numerous other examples of State actions identified in paragraphs 40 and 41 of the second report.

79. With respect to draft conclusion 7, paragraph 3, the relationship between action and inaction in identifying practice required further investigation.

80. Given the wide range of international organizations, with a great variety of mandates, it was not possible to draw a general conclusion such as was expressed in draft conclusion 7, paragraph 4. The conclusion should be revisited in the Commission's consideration of the third report on the topic.

81. Referring to draft conclusion 8, paragraph 2, he said that, in considering a State's practice as a whole, it would be useful to identify which organs were competent and had the authority to act on behalf of the State. The practice of States whose organs did not speak with one voice could not be completely disregarded.

82. Lastly, he shared the concerns of members who had expressed doubts on draft conclusion 9, paragraph 4.

83. Mr. GEVORGIAN, speaking as a member of the Commission, said that he supported the combined "two-element approach", as reflected in draft conclusion 3. Attempts to separate State practice from *opinio juris* might result in overemphasizing one element or in futile arguments like the one as to which came first, the chicken or the egg. Both elements—State practice and *opinio juris*—had to exist simultaneously in order to give rise to rules of customary international law. However, he endorsed Mr. Nolte's suggestion that the term "*opinio juris*" be used in tandem with "accepted as law", since the two terms combined overcame the inadequacies of each when used in isolation.

84. He supported the scope of the topic as set forth in draft conclusion 1. The Commission should concern itself only with the methods of determining the existence and content of rules of customary international law, and not with their formation, and it should not deal with peremptory norms of international law. He was not troubled by the use of the term "methodology", and he would object to replacing it with a reference to "rules", as it might alarm some States. Moreover, a provision should be included to the effect that the existence or formation of rules of customary law must not conflict with *jus cogens*, in accordance with the principle embodied in the 1969 Vienna Convention that a breach of the law could not create law.

85. Like the Special Rapporteur, he doubted whether the definitions in draft conclusion 2 were necessary. On the whole, he supported draft conclusion 3, the wording of which could be improved in the Drafting Committee. Indeed, several of the draft conclusions should be fleshed out and made less vague. Like other members, he had some doubts about the phrase "regard must be had to the context" in draft conclusion 4. If it was supposed to mean that different types of evidence of the existence of practice could have dissimilar weight depending on the context, then that idea should be better conveyed.

86. The Commission should make it plain, either in the draft conclusions or in the commentary, that it was State practice coupled with *opinio juris* that was of relevance for the formation of rules of customary law. The practice of individuals and NGOs was not pertinent for that purpose; the practice of international organizations was simply an additional means of shedding light on State practice. The Commission should also pay serious attention to the attribution of conduct to a State and to the weight of various acts of a State in the formation of customary rules. State practice directed at the outside world, especially when it was that of organs competent to bind the State at the international level, should be accorded the greatest significance. For that reason, draft conclusion 8, paragraph 1, should be deleted. Similarly, he was unconvinced of the need for a provision establishing that if the organs of a State were not unanimous, a practice was less important. In general, State practice could take the form of physical and verbal actions, inaction and silence. What was important was the interaction between them. It would be necessary to look more closely at the role of inaction and the circumstances in which it could be regarded as State practice for the purpose of forming customary international law.

87. On the whole, he could support draft conclusion 10, which covered two highly important elements: practice as a legal obligation and acceptance as law as a criterion for distinguishing between a customary rule and usage.

88. With regard to draft conclusion 11, while the evidence of *opinio juris* could sometimes be contained in the same acts as those which established State practice, it might be wise to restrict the list of such sources to State acts chiefly directed at the outside world. That section should reflect the idea, implicit in the reference in paragraph 64 of the second report to the "general consensus of States", that universal *opinio juris* was vital if State practice itself, albeit widespread, was not universal.

89. He was in favour of referring the draft conclusions to the Drafting Committee.

The meeting rose at 5.50 p.m.

3227th MEETING

Friday, 18 July 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Programme, procedures and working methods of the Commission and its documentation

[Agenda item 12]

1. The CHAIRPERSON proposed, in light of the consensus which had emerged from consultations, to include the topic "Crimes against humanity" in the Commission's programme of work and to appoint Mr. Murphy Special Rapporteur.

It was so decided.

Identification of customary international law (*continued*) (A/CN.4/666, Part II, sect. D, A/CN.4/672)

[Agenda item 9]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

2. The CHAIRPERSON invited the Commission members to resume their consideration of the second report on the identification of customary international law (A/CN.4/672).

3. Mr. GÓMEZ ROBLEDO said that he wished to address a few comments to the Drafting Committee. First, the structure of the draft conclusions and the separate treatment given to definitions and to each of the constituent elements of custom would indeed help practitioners to identify customary international law. Second, since "methodology" was acknowledged to be the main purpose of the draft conclusions, consideration of the genesis, or formative elements of custom, necessarily formed part of the intellectual process of identifying customary law, without prejudice to the flexibility which must naturally be displayed in that exercise. A note to that effect could be included in the commentary, where it could also be explained, with reference to draft conclusion 4, that the terms "context" and "surrounding circumstances" might not cover all aspects of the formation of a customary rule. Third, it might be preferable to mention *erga omnes* obligations in the commentary to draft conclusion 1, paragraph 2, for although they were often customary in nature and might help to determine the existence of a customary rule, they did not belong to the subject under consideration. Fourth, an express reference to *opinio juris* was really required when speaking of the psychological element, otherwise users who were not specialists in international law might incorrectly assume that it was a separate concept. Fifth, it was questionable whether the phrase "that derive from" was indispensable in the proposed definition of customary international law, since general practice and the acceptance of that practice as law were central to the identification of a customary rule. It would be sufficient to state that the rules of customary international law "reflect" the existence of both elements. In addition, the disputed term seemed to imply hierarchies among the various forms of practice, an eventuality which draft conclusion 8, paragraph 1, expressly ruled out. Sixth, it would be wise to specify that customary international law could be *universal* or *regional* and to define the notion of "international conference". Seventh, although the relevant practice was primarily that of States, it was also appropriate to consider that of *non-State actors* with respect to the rules of international humanitarian law, especially in the context of non-international armed conflicts. The third report should examine the question of the acts of international organizations in greater depth and should also consider the acts of *sui generis* subjects of international law, such as ICRC. While it was true that, provided there was certainty as to the consistency of a practice, no particular duration was necessary, it would be helpful if the third report were to contain a more detailed analysis of "instant custom", an issue which likewise encompassed the acts of international organizations and the value of their resolutions, especially in light of the "Castañeda doctrine". Eighth, as far as evidence of practice was concerned, unanimity would be hard to prove owing to the increasing participation of non-traditional State entities in international affairs. Was there perhaps a presumption that the executive branch was competent to speak on behalf of the State as a whole? As for *opinio juris*, it would be necessary to examine the impact of a customary rule on legal certainty and of contradictory positions expressed by the same State as a result of a change in government. Draft conclusion 9, paragraph 4, was confusing, for practitioners should focus their attention on whether a practice was sufficiently representative and not on the possible existence of special interests. Lastly, the Special Rapporteur should look more closely at the relationship between the topic under consideration and the provisional application of treaties, for it might contribute to the crystallization of a rule of customary international law.

4. The CHAIRPERSON invited the Special Rapporteur on the identification of customary international law to sum up the debate on his second report.

5. Sir Michael WOOD (Special Rapporteur) said that the debate had confirmed that there was widespread support for the "two element" approach. As had been suggested, the temporal aspects of the two elements and the relationship between them should be addressed, possibly in a new part of the draft conclusions. Generally speaking, the members of the Commission still agreed that the decisions of international courts and tribunals must primarily guide its work. Likewise there was continuing consensus on the outcome of that work which, in Mr. Park's words, should take the form of a "practical guide to assist practitioners in the task of identifying customary international law" and should not be overly prescriptive. As Mr. Tladi, Mr. Saboia and Mr. Gómez Robledo had noted, it would be necessary to clarify—at least in an introductory commentary—to what extent the Commission intended to cover the formation *and* the identification of custom. Mr. Murphy had rightly raised the question of the balance between the draft conclusions and the commentaries, because he feared that the reader would stop at the former and not go on to read the latter. The reader's attention could be drawn to the importance of the commentaries in the body of the draft conclusions, or in the introduction thereto, in language similar to that to be found in the introduction to the Guide to Practice on Reservations to Treaties.[245] The commentaries themselves should be concise, modelled on the commentaries to the draft articles on responsibility of States for internationally wrongful acts,[246] or the draft articles on the responsibility of international organizations.[247] A brief

[245] General Assembly resolution 68/111 of 16 December 2013, annex. The guidelines constituting the Guide to Practice on Reservations to Treaties adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2011*, vol. II (Part Three), chap. IV, sects. F.1 and F.2.

[246] General Assembly resolution 56/83 of 12 December 2001, annex. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

[247] See the draft articles on the responsibility of international organizations adopted by the Commission at its sixty-third session and the commentaries thereto in *Yearbook … 2011*, vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

general introductory commentary could touch on the importance and role of customary international law in the modern world. The overall length of the draft conclusions and commentaries thereto should not exceed 20 to 30 pages. Any reader who wanted further details could refer to the reports and debates and to a bibliography drawn up for that purpose.

6. Turning to issues of substance, he agreed that it would be wise to specify that the practice in question was above all that of States, but without going so far as to dismiss the practice of intergovernmental organizations, at least that of certain organizations in fields such as treaties, privileges and immunities and the internal law of international organizations. The European Union was admittedly a special organization, but the fact remained that it exercised some of its member States' powers.

7. With regard to draft conclusion 1, he had noted with interest that the word "methodology" caused some difficulty, perhaps for reasons of translation. Several solutions had been proposed; they consisted in either omitting the term, which would deprive the draft conclusion of meaning, or replacing it either with "methods", which might suggest that other methods existed for the identification of custom and that they should be taken into consideration; or with "method", which would be less appropriate in English; or with the term "rules", as proposed by Mr. Forteau and Mr. Nolte. His own reaction, however, was the same as that of Mr. Candioti and Mr. Gevorgian; he would not take the risk of opening a debate on the nature of those rules. Mr. Petrič had suggested that a reference should be made to "rules *and principles* of international law", but that might wrongly create the impression that two separate categories—rules and principles—existed. The commentary could make it clear that the expression "rules of international law" must be understood in the broad sense to cover legal principles as well. He left it to the Drafting Committee to decide whether the contents of draft conclusion 1, paragraph 2, should be included in the commentary, and whether draft conclusion 2 should be deleted, as proposed by Mr. Tladi, Mr. Vázquez-Bermúdez, Ms. Escobar Hernández and Mr. Gevorgian, for the Commission's opinion was sharply divided and he personally was uncertain on that point.

8. In draft conclusion 3, the expression "general practice" left room for practice other than that of States and had met with widespread approval. On the other hand, "accepted as law" appeared to be more controversial and the proposal had been made that it should be followed by the term "*opinio juris*", possibly in brackets. It seemed that, while the majority of Commission members endorsed the idea that the basic approach to custom did not vary according to the different fields of international law, some had rightly emphasized that this did not exclude the possibility that it might be *applied* differently, depending on the type of rule. With regard to draft conclusion 4, the whole question of the assessment of evidence, including the burden of proof, required more careful consideration. The main issue raised in relation to draft conclusion 5 concerned the expression "primarily" which was used to take account of the role of international organizations, but which seemed to cause some uncertainty. Draft conclusion 6 needed to be looked at more closely, in order to determine whether the rules on attribution adopted in the context of State responsibility could be transposed in their entirety. The questions raised by Mr. Huang about the lawfulness of practice also required more reflection.

9. Draft conclusion 7, paragraphs 1 and 2, had received wide support, subject to some minor modifications. All the members who had spoken on that point had seemed to welcome the inclusion of verbal as well as physical acts. On the other hand, paragraphs 3 and 4 raised bigger issues which would be addressed in the following report. Some interesting comments on drafting and substance had been made on draft conclusion 8, in particular with regard to a possible hierarchy of forms of practice and conflicting practice within the same State. Some of those points might be dealt with in the commentary, depending on the form taken by the final wording of that draft conclusion. In any event, the emphasis was on the adjective "predetermined" and not on the lack of a hierarchy, since the acts of a low-level local official obviously did not carry the same weight as those of spokesperson of a Ministry for Foreign Affairs. Draft conclusion 9, paragraphs 1 to 3, had been regarded as acceptable on the whole, although the use of some terms had been rightly criticized. While paragraph 4, with its reference to "specially affected States" had been well received by several members, it had attracted a good deal of comment and criticism, some of which, from Mr. Forteau, Mr. Vázquez-Bermúdez, Ms. Escobar Hernández and Mr. Singh, among others, had not been entirely warranted. Some members had apparently misunderstood what was intended by that provision, which reflected the case law of the International Court of Justice. He had certainly not intended to suggest that the practice of certain "Great Powers", or of the permanent members of the Security Council, should be deemed essential for the formation of a rule of customary international law. He had thought that the explanation supplied in paragraph 54 would be sufficient to clarify the meaning of that provision, especially as it was not couched in peremptory language ("due regard is to be given") and as the category of States, those "whose interests are specially affected", varied from rule to rule and by no means included any particular State. He would clearly have to explain that concept if the paragraph were retained in one form or another.

10. Draft conclusions 10 and 11 had elicited comments similar to those concerning the corresponding conclusions on "general practice". It had been pointed out that the wording could be more closely aligned. The "double counting" in draft conclusion 11, paragraph 4, and the similarity of the lists in draft conclusion 11, paragraph 2, and draft conclusion 7, paragraph 2, had been much disputed and debated. That issue required in-depth consideration, since there was clearly a substantive difference among members which he did not fully understand.

11. Obviously much ground still needed to be covered in future work on the topic. It would be necessary to make a more detailed examination of some aspects of international organizations; the ideas put forward on that subject by Mr. Murphy, Mr. Tladi and Mr. Hassouna would be helpful. Although international organizations

must certainly be included in the draft conclusions, the various issues which arose would have to be explained with more care. It would also be necessary to look more closely at customary international law and treaties and customary international law and resolutions, including the "Castañeda doctrine". In addition, he intended to cover the subjects of the "persistent objector" and regional, local and bilateral custom. The role of inaction also required further scrutiny.

12. Mr. Park, Mr. Murase and Ms. Jacobsson had put forward the idea of more thoroughly exploring the question of the burden of proof of the existence of customary international law. Mr. Caflisch and Mr. Kamto had thought that it would be wise to address the question of the transformation of general principles into customary international law. Mr. Nolte and Ms. Escobar Hernández would welcome a study of the relationship between general principles and customary international law. He wondered exactly what Mr. Murase had had in mind when he had suggested that it was necessary to deal with the "question of unilateral measures and their opposability". Several members had deemed it necessary to examine the temporal aspects of the two elements and the relationship between them.

13. The proposed plan of work seemed to have received general approval, notwithstanding Mr. Forteau's *festina lente* comment and similar words of caution from Mr. Nolte. Admittedly the timetable seemed ambitious, but there was no harm in trying. In any event, he would not sacrifice quality for speed. If, as almost all members had recommended, the draft conclusions were referred to the Drafting Committee, he hoped that it would have the time to examine most, if not all, of them at the current session. If the Commission managed to adopt the draft conclusions at the first part of the 2015 session, he could submit the corresponding draft commentaries at the second part of the same session.

14. The question put by Mr. Hassouna regarding the means of making evidence of customary international law more readily available should be included in chapter III of the Commission's report.

15. The CHAIRPERSON said that, if he heard no objections, he would take it that the Commission wished to refer the 11 draft conclusions contained in document A/CN.4/672 to the Drafting Committee.

It was so decided.

Organization of the work of the session (*concluded*)[*]

[Agenda item 1]

16. The list of members of the Drafting Committee on the identification of customary international law was read out: Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hmoud, Mr. Kamto, Mr. Kittichaisaree, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Petrič, Mr. Sabia (Chairperson), Mr. Vázquez-Bermudez and Mr. Tladi (*ex officio*).

[*] Resumed from the 3225th meeting.

Protection of the environment in relation to armed conflicts[248] (A/CN.4/666, Part II, sect. F, A/CN.4/674[249])

[Agenda item 10]

Preliminary report of the Special Rapporteur

17. The CHAIRPERSON invited the Special Rapporteur, Ms. Jacobsson, to present her preliminary report on the protection of the environment in relation to armed conflicts (A/CN.4/674).

18. Ms. JACOBSSON (Special Rapporteur) said that, for the sake of conciseness, she had not repeated the background to the topic in her preliminary report and that the latter should therefore be read in conjunction with the syllabus annexed to the Commission's report on its session in 2011.[250] She proposed that the topic be approached by looking at three temporal phases, namely those before, during and after an armed conflict, since that would make it easier to study the topic, to draw conclusions or to formulate specific guidelines. Although the members of the Commission and States in the Sixth Committee had welcomed that approach, opinions had diverged as to the relative importance to be attached to each of those phases. In her view, the emphasis should be on the first phase, in other words on peacetime obligations of relevance to a potential armed conflict, and on the third phase, in other words on post-conflict measures. No strict dividing line should, however, be drawn between the various phases, since it would be artificial and would give the wrong idea of how the pertinent legal rules applied.

19. She intended to examine the guiding principles and/or obligations with regard to environmental protection under international law in the context of: (*a*) preparations for a potential armed conflict; (*b*) the conduct of armed conflict, and (*c*) post-conflict measures in relation to environmental damage. She wished to exclude the root causes of armed conflicts, protection of the cultural heritage and the effect of particular weapons from the scope of the topic, and the matter of refugees and displaced persons had to be approached with caution.

20. In her preliminary report, the Special Rapporteur offered an overview of the first phase of the topic: the rules and principles applicable in the event of a potential armed conflict (peacetime obligations). She did not address measures to be taken during or after an armed conflict, even if preparatory action necessary for the execution of those measures had to be undertaken prior to the outbreak of an armed conflict. She examined aspects related to scope and the use of certain terms and sources, and the manner in which the topic related to other topics previously considered by the Commission, such as the effects of armed conflicts on treaties, non-navigational uses

[248] At its sixty-third session (2011), the Commission decided to include the topic in its long-term programme of work (*Yearbook … 2011*, vol. II (Part Two), p. 175, para. 365, and *ibid.*, annex V, pp. 211 *et seq.*). At its sixty-fifth session (2013), the Commission decided to include the topic in its programme of work and appointed Ms. Marie G. Jacobsson Special Rapporteur on the topic (*Yearbook … 2013*, vol. II (Part Two), p. 72, para. 131).

[249] Reproduced in *Yearbook … 2014*, vol. II (Part One).

[250] *Yearbook … 2011*, vol. II (Part Two), annex V, pp. 211 *et seq.*

of international watercourses, shared natural resources, the prevention of transboundary damage from hazardous activities and the allocation of loss from transboundary harm arising out of hazardous activities. She identified the legal obligations and principles stemming from international environmental law that might serve as guidelines for preventive measures to reduce the adverse impact which a potential armed conflict could have on the environment. Since peacetime law was fully applicable when there was no armed conflict, the challenge was that of identifying peacetime rules and principles of relevance to the topic. At the current stage of deliberations, it would have been premature to attempt to evaluate the extent to which those rules might continue to apply during or after an armed conflict. Although the precautionary principle and the duty to undertake an environmental impact assessment had their counterparts in international humanitarian law, responsibilities under the law of armed conflict differed greatly from peacetime obligations. Some aspects of the aim and purpose of those obligations were, however, similar in war and in peacetime. She would compare those rules in a later report on the second phase of the topic.

21. The report under consideration was confined to the most important principles, concepts and obligations and did not attempt to determine the conventions that continued to apply during an armed conflict. She had not listed all the bilateral or international agreements that regulated the protection of the environment or of human rights, for those treaties applied in full in peacetime. She had suggested definitions of the terms "armed conflict" and "environment" in order to facilitate discussion. It would be interesting to hear members' views on those terms, including whether they considered it preferable not to define them. She had based the section on human rights and the environment on the work of John Knox, the United Nations Independent Expert on human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, in particular on two reports that he had presented to the Human Rights Council.[251] The report under consideration contained conclusions that were consonant with those of the Independent Expert with regard to the existence of a right to a healthy environment, procedural obligations, substantive obligations and vulnerable groups.

22. The three-year timetable proposed in paragraph 168 of the preliminary report was realistic only if the Commission drew up draft guidelines, conclusions or recommendations. She was doubtful about formulating draft articles, but deferred to the Commission on that matter. She would continue to consult ICRC, UNESCO, the United Nations Development Programme and regional organizations. It would also be most helpful if States were to provide examples of cases where the rules of international environmental law, including bilateral or regional treaties, had continued to apply in times of international or non-international armed conflict, examples of provisions of relevance to the topic under consideration and examples of decisions applying national or international environmental law.

23. Mr. MURASE said that the topic under consideration was particularly important because it addressed both the linkages and the tension between two fields of international law, namely environmental law and the law of armed conflict. While he commended the Special Rapporteur's cautious approach, the way she had delimited the scope of the topic was problematic. During consultations at the previous session, he and many other members had held that work should focus mainly on the rules applicable during an armed conflict, which the preliminary report did not appear to have done. He failed to understand why the Special Rapporteur intended to concentrate on internal armed conflicts, to the exclusion of international armed conflicts. In the syllabus that she had submitted in 2011,[252] she had, however, clearly focused on the protection of the environment during armed conflict, and had quoted the Viet Nam War and the first Gulf War as examples of warfare that raised the vital legal issue of whether the use of certain weapons capable of wreaking havoc on the environment could be justified under *jus in bello*.

24. In addition, in paragraph 61 of her preliminary report, the Special Rapporteur stated that "there cannot be a strict dividing line between the different phases" of an armed conflict, whereas the application of the law of armed conflict was premised on the idea of a clear dividing line between those phases, as was plain from article 3 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I). He wondered why the preliminary report focused on a discussion of peacetime international environmental law, when the topic did not concern the protection of the environment in general, but specifically its protection in relation to armed conflict. For example, the principle of sustainable development was of limited relevance to the Commission's work, because it was concerned with protection of the environment associated with economic development, which was not a priority in the exceptional circumstances of an armed conflict. The Special Rapporteur rightly stated that some rules of the law of armed conflict also applied in the phases before and after the conflict, but she had not specified which, whereas those provisions were vital, above all if draft articles or guidelines were to cover the first phase of a conflict. In any event, with regard to the first phase, the Commission must limit itself to the content of the existing rules of the law of armed conflict. For example, article 36 of Protocol I made it possible to cover any new weapon that might endanger international watercourses or transboundary aquifers. It was, however, difficult, if not impossible, to construe it as extending to all the principles and rules of international environmental law. That showed that initially the Commission should confine itself to recommending to States parties that they should carefully test new weapons, while taking all the necessary precautions and draw up military manuals in anticipation of future armed conflicts. It was unclear whether protection of the environment around military bases fell within the ambit of the topic.

25. Mr. KITTICHAISAREE noted that, in paragraph 47 of her preliminary report, the Special Rapporteur

[251] Preliminary report (A/HRC/22/43) and mapping report and addendum on the Independent Expert's mission to Costa Rica (A/HRC/25/53 and Add.1), submitted to the Human Rights Council at its twenty-second and twenty-fifth sessions, respectively.

[252] *Yearbook … 2011*, vol. II (Part Two), annex V, pp. 211 *et seq.*, and especially pp. 211–212, paras. 6 and 10.

expressed the opinion that States and international organizations had an awareness of environmental issues and clearly intended to take them into account when planning and conducting military operations in peacetime. It was doubtful whether that statement was true everywhere, for the practice examined in the preliminary report was essentially that of industrialized States that had the financial, material and technical resources to factor in environmental concerns. Moreover, that practice was not homogenous. In *Winter, Secretary of the Navy*, et al. v. *Natural Resources Defense Council, Inc.*, et al., the United States Supreme Court had ruled against an environmental defence association which had sought the adoption by the American navy of maximum precautions when training with sonar equipment that might jeopardize marine mammals. It would therefore not be altogether correct to draw conclusions as to the existence of firmly established, generally recognized obligations to protect the environment during military operations, even in peacetime. The Commission must be cautious and not expect unreserved support from States when broaching issues pertaining to national security and defence.

26. The protection of the cultural heritage, which was already regulated by several international instruments, should not be addressed; the same was true of the effects of certain weapons. On the other hand, the Special Rapporteur's emphasis on the need to deal with non-international armed conflicts inevitably posed the question of whether non-State actors were bound by the rules of international environmental law. The distinction between the "natural environment" and the "human environment" should not be reflected in the definition of the environment for the purposes of the topic; first, because it was not plain from the ICRC commentary[253] to article 35, paragraph 3, of Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), what purpose was served by that distinction, or what legal value it had and, second, because the different natural interrelationships between ecosystems were not a matter for legal analysis. No decision had yet been reached on whether the principle of a sustainable environment remained applicable in an armed conflict. The general, imprecise nature of that principle seemed to suggest that it did not play a key role. In addition, the fact that it was usually regarded as more of a political and socioeconomic concept than a legal principle confirmed the view that it would be impossible to class it among the legal rules applicable in an armed conflict without leading to greater confusion. The findings of the WTO Appellate Body referring to that notion were of little relevance to the Commission's work, for they were predicated on purely trade-oriented considerations. Lastly, with regard to the precautionary principle, the decisions of the Court of Justice of the European Union cited in paragraphs 143 and 144 of the preliminary report were contradictory. While the judgment in the case concerning *Alpharma Inc.* v. *Council of the European Union* stated that the Community institutions might adopt a measure based on the precautionary principle, the Special Rapporteur inferred from the *Waddenzee* judgment that the member States of the European Union were bound by that principle. The following report should clarify the legal status and content of States' obligations stemming from the precautionary principle.

The meeting rose at 12.40 p.m.

[253] Available from the ICRC website: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp.

3228th MEETING

Tuesday, 22 July 2014, at 10 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Cooperation with other bodies (*continued*)*

[Agenda item 14]

STATEMENT BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIRPERSON welcomed Judge Peter Tomka, President of the International Court of Justice, and invited him to address the Commission.

2. Judge TOMKA (President of the International Court of Justice) said that, in fulfilling its role as the principal judicial organ of the United Nations, the International Court of Justice had rendered three major judgments in the past year on the merits of cases concerning international disputes.

3. The first of those judgments had been delivered in the case concerning the *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) (*Cambodia* v. *Thailand*). The case had been brought before the Court by Cambodia in 1959 following the occupation of the Temple of Preah Vihear by Thailand in 1954 and the failure of subsequent negotiations between the two countries. During the proceedings in the original case, Cambodia had relied on a map, referred to as the "Annex I map", which showed the frontier between it and Thailand as passing to the north of Preah Vihear, thus leaving the Temple in Cambodian territory. In its 1962 judgment, the Court had found that the Temple was situated in territory under the sovereignty of Cambodia; that Thailand was under an obligation to withdraw any military or police forces, or other guards or keepers, stationed by it at the Temple, or in its vicinity on Cambodian territory; and that Thailand was

* Resumed from the 3224th meeting.

under an obligation to restore to Cambodia any objects which might, since the time of the occupation of the Temple by Thailand in 1954, have been removed from the Temple or the Temple area by the Thai authorities.

4. In its judgment, delivered on 11 November 2013, the Court had concluded that there was a dispute between the parties as to three specific aspects of the 1962 judgment: first, whether the 1962 judgment had or had not decided with binding force that the line depicted on the Annex I map constituted the frontier between the parties in the area of the Temple; second, the meaning and scope of the phrase "vicinity on Cambodian territory", used in the second operative paragraph of the judgment; and third, the nature of the obligation of Thailand to withdraw its personnel, imposed by the second operative paragraph of the judgment.

5. The Court had observed that three features of the original judgment were of particular relevance: first, in 1962, the Court had considered that it was dealing with a dispute regarding territorial sovereignty over the area in which the Temple was located and that it was not engaged in delimiting the frontier between the parties; second, the Annex I map had played a central role in the reasoning of the Court; and third, in defining the dispute before it, the Court had made it clear that it was concerned only with sovereignty in the "region of the Temple of Preah Vihear".

6. After analysing the scope and meaning of the first operative paragraph of the 1962 judgment, the Court had concluded that it was clearly a finding that the Temple was situated in territory under the sovereignty of Cambodia. Having then clarified the meaning of the term "vicinity", as employed in the 1962 judgment, the Court had concluded that the "vicinity" of the Temple would extend to the entirety of the Preah Vihear promontory on which the Temple was situated, but to not territory outside that promontory. It thereby rejected the contention by Cambodia that the "vicinity" also included the hill of Phnom Trap. Lastly, the Court had found that the terms "vicinity [of the Temple] on Cambodian territory", in the second operative paragraph, and "area of the Temple", in the third operative paragraph, referred to the same small parcel of territory. The obligations that had been imposed by the Court in 1962 with respect to that parcel of territory were thus a consequence of the finding contained in the first operative paragraph. Lastly, the Court had concluded that the territorial scope of the three operative paragraphs was the same and corresponded to the limits of the promontory of Preah Vihear.

7. On 27 January 2014, the Court had delivered another judgment on the merits—in the *Maritime Dispute* between Peru and Chile, which had presented a peculiar factual scenario. The parties had advanced opposite—and fundamentally different—views on how the Court should proceed in allocating their respective maritime areas. Peru had argued that no agreed maritime boundary existed between the two countries and had asked the Court to determine the delimitation by applying its usual three-stage methodology. For its part, Chile had taken the view that the Court should not effect any delimitation, since there was already an international maritime boundary, agreed between both parties, along the parallel of latitude passing through the starting point of the Peru–Chile land boundary and extending to a minimum of 200 nautical miles.

8. On the basis of the evidence submitted to it, the Court had found that the parties had acknowledged, in a 1954 agreement,[254] the existence of a maritime boundary, along the parallel of latitude, running out to an unspecified distance. In view, in particular, of the fishing practice and activities of the parties in the early 1950s, the Court had concluded that the agreed maritime boundary extended to a distance of 80 nautical miles along the parallel from its starting point.

9. Turning to the determination of the undefined maritime boundary from the endpoint of the agreed maritime boundary, the Court had proceeded on the basis of article 74, paragraph 1, and article 83, paragraph 1, of the United Nations Convention on the Law of the Sea, which reflected customary international law. In applying its three-stage methodology, the Court had considered that no relevant circumstances called for an adjustment of the provisional equidistance line and that no significant disproportion was evident, such as would call into question the equitable nature of the provisional equidistance line.

10. He wished to commend both parties on reaching—soon after the delivery of the judgment—an agreement on the precise geographical coordinates of their maritime boundary on the basis of the description thereof in the Court's judgment.

11. The third major judgment rendered during the period under review related to the case concerning *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening)*. Australia had alleged that the continued pursuit by Japan of a large-scale programme of whaling under the Second Phase of its Japanese Whale Research Programme under Special Permit in the Antarctic (JARPA II) was in breach of obligations assumed by Japan under the International Convention for the Regulation of Whaling.

12. Australia had further alleged that, because JARPA II was not a programme for purposes of scientific research within the meaning of article VIII of the Convention, Japan had breached three substantive provisions of the Schedule to the Convention. The provisions in question were the obligation to respect the moratorium setting zero-catch limits for the killing for commercial purposes of whales from all stocks; the obligation not to undertake commercial whaling of fin whales in the Southern Ocean Sanctuary; and the obligation to observe the moratorium on the taking, killing or treating of whales, except minke whales, by factory ships. Japan had contested all of those allegations, arguing that its JARPA II programme had been undertaken for purposes of scientific research and that it was therefore covered by the exemptions provided for in article VIII, paragraph 1, of the Convention.

13. The Court had considered that article VIII of the Convention gave discretion to a State party to the Convention to reject the request for a special permit or to specify the conditions under which a permit would be granted, but that the question of whether the killing, taking and treating of whales pursuant to a requested special permit

[254] Agreement relating to a Speical Maritime Frontier Zone (Lima, 4 December 1954).

was for purposes of scientific research could not depend simply on that State's perception. In order to ascertain whether a programme's use of lethal methods was for purposes of scientific research, in accordance with the wording of article VIII, the Court had had to consider whether the elements of a programme's design and implementation were reasonable in relation to its stated objectives. In the Court's view, the fact that a programme involved the sale of meat and the use of proceeds to fund research was not sufficient, taken alone, to cause a special permit to fall outside article VIII.

14. Following an assessment of the design and implementation of JARPA II in light of article VIII of the Convention, the Court had considered that the evidence showed that, at least for some of the data sought by the programme's researchers, non-lethal methods were not feasible. However, the Court had considered that the Japanese whaling programme should have included some analysis of the feasibility of non-lethal methods as a means of reducing the planned scale of lethal sampling in the programme.

15. The Court had then assessed the scale of the use of lethal methods in JARPA II, concluding that the failure by Japan to make any changes to the programme's objectives and the target sample size, despite a discrepancy between the actual take and those targets, cast doubt on the characterization of JARPA II as a programme for purposes of scientific research.

16. In its judgment, the Court had considered that, while JARPA II involved activities that could broadly be characterized as scientific research, the evidence before it had not established that the programme's design and implementation were reasonable in relation to achieving the programme's objectives. Accordingly, the Court had held that the special permits granted by Japan for the killing, taking and treating of whales in connection with JARPA II were not "for purposes of scientific research" pursuant to article VIII, paragraph 1, of the Convention. The Court had therefore found, *inter alia*, that Japan had not acted in conformity with its obligations concerning the moratorium on commercial whaling and concerning the factory ship moratorium in each of the seasons during which fin whales had been taken, killed and treated in JARPA II.

17. With regard to remedies, the Court had ordered that Japan should revoke any extant authorization, permit or licence to kill, take or treat whales in relation to JARPA II and refrain from granting any further permits under article VIII, paragraph 1, of the Convention in pursuance of that programme.

18. The judgment, which had demonstrated the Court's ability to handle highly scientific evidence, was a fitting response to criticism voiced in certain scholarly circles and elsewhere that the Court was ill-equipped to handle fact-intensive, science-heavy cases. Furthermore, the Court's preparatory work relating to the subsequently discontinued case concerning *Aerial Herbicide Spraying*, which had also involved complex facts and technical considerations, had been praised by both parties, which had acknowledged the Court's key contribution to the settlement of the case.

19. In early 2014, the Court had held public hearings on the merits of the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*. That case raised some difficult issues with regard to the merits of the main claim and counterclaim, and some very challenging jurisdictional questions. Croatia complained that Serbia had committed violations of international humanitarian law from 1991 to 1995, while Serbia, by way of counterclaim, alleged similar violations with respect to acts carried out by Croatia in 1995. The judgment was now being meticulously prepared, and it was hoped that it would be rendered in early 2015, enabling the parties to close a final chapter in the aftermath of the break-up of Yugoslavia.

20. In September 2014, the Court would hold public hearings on the merits of the case concerning *Questions relating to the Seizure and Detention of Certain Documents and Data*, which had been brought to the Court only in December 2013. In March 2014, the Court had already indicated certain provisional measures in response to the request of Timor-Leste for such measures, a timeline that showed that the Court was capable of delivering timely and efficient dispute resolution.

21. The Court had again been kept busy with the cases concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*, in which the proceedings had been joined. In November 2013, in response to a request from Costa Rica, the Court had rendered an order on provisional measures to be taken by Nicaragua. In December 2013, the Court had unanimously found that the circumstances were not such as to require the indication of the provisional measures against Costa Rica that had been requested by Nicaragua. It hoped to be able to hold public hearings on the merits of the joined proceedings in the spring of 2015.

22. The Court's recent activities were proof that States were increasingly turning to the principal judicial organ of the United Nations as a propitious forum for achieving the peaceful settlement of disputes that had potential consequences for the conservation of the natural environment. Two cases in point were the *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)* and *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua* v. *Colombia)*, both of which had been filed in 2013. In February 2014, Costa Rica had instituted proceedings in the case concerning *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean*. Those proceedings were historically significant in that it was the first time that a State had asked the Court to effect a maritime delimitation in areas lying seaward of both extremities of a shared land frontier. In April 2014, the Marshall Islands had instituted proceedings against India, Pakistan and the United Kingdom in three separate cases involving *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*. In the proceedings against the United Kingdom, the Marshall Islands had relied on obligations under the 1969 Treaty on the Non-Proliferation of Nuclear Weapons; in those against

India and Pakistan, it had cited customary international law. In all those proceedings, the Marshall Islands invoked as the jurisdictional basis the reciprocal declarations recognizing the Court's jurisdiction as compulsory made by the parties pursuant to Article 36, paragraph 2, of the Statute of the International Court of Justice.

23. On 23 September 2013, the Court had held a conference to celebrate the centenary of the Peace Palace. The conference, which had brought together a roster of distinguished speakers, had been a resounding success and had offered an opportunity for lively exchanges and dialogue. The speakers' contributions were to be published under the title *Enhancing the Rule of Law through the International Court of Justice*.[255]

24. In just under 25 years, the Court had delivered more judgments than in the first 45 years of its existence, achieving the peaceful resolution of disputes on such matters as maritime or land boundaries, treaty interpretation, environmental law, sovereignty over maritime features and the protection of living resources and human health. However, like all international adjudicative models, the Court's jurisdiction to proceed with the settlement of disputes remained subject to the consent of the parties appearing before it. It was therefore unfortunate that only approximately one third of States Members of the United Nations had made the declaration under Article 36, paragraph 2, of the Statute of the International Court of Justice. He hoped that States which publicly declared their support for the rule of law in international relations would make that declaration in the near future.

25. Mr. MURPHY observed that the Court's extensive treatment of scientific data in the case concerning *Whaling in the Antarctic* stood as a rebuttal of the criticism voiced after the case concerning *Pulp Mills on the River Uruguay*. He would welcome additional information about the Court's approach to dealing with evidence in the case concerning *Aerial Herbicide Spraying*, and wished to know whether it might serve as a model in cases involving complicated facts and scientific evidence in the future.

26. Mr. TOMKA (President of the International Court of Justice) explained that in some cases requiring the consideration of a wealth of facts or scientific data, it was useful to commence preparations for a hearing well in advance. In the case in question, 15 months before the scheduled hearing, the judges had held a short exchange of views and had appointed two members of the Court to prepare a detailed report summarizing the voluminous pleadings. Questions had then been sent to the parties, which had been invited to concentrate on particular issues in the oral proceedings. The Court had also identified three United Nations agencies whose experts could be called in, if necessary, to explicate the scientific data.

27. Mr. VÁZQUEZ-BERMÚDEZ said that the number of cases brought to the International Court of Justice by Latin American countries betokened their trust in the work of the principal judicial organ of the United Nations. He asked whether principles of municipal law, as general practice accepted by *opinio juris*, could become part of the sources of international law which were referred to anachronistically, in Article 38, paragraph 1 *c*, of the Statute of the International Court of Justice, as "general principles of law recognized by civilized nations".

28. Mr. TOMKA (President of the International Court of Justice) agreed that Article 38 was couched in antiquated language: after all, it had been based on the Statute of the Permanent Court of International Justice. The Court could apply general principles of domestic law or of customary international law to settle a dispute when there were no specific conventions or treaties governing the subject matter, or to clarify the terms of international conventions. General principles might play a more important role in some cases than in others. For example, it would be hard to find a specific international convention concerning the confidentiality of communications between lawyers and their clients, but some principles could certainly be found in States' legal systems. The case concerning *Questions relating to the Seizure and Detention of Certain Documents and Data* might therefore be one where such general principles might play a role.

29. Mr. FORTEAU, referring to the Court's recent case law such as its advisory opinion on the *Accordance with International Law of the Unilateral Declaration of Independence with respect to Kosovo* and the case concerning *Whaling in the Antarctic*, noted that in each case it had applied special rules to the interpretation of unilateral acts which are not identical to the rules applicable to the interpretation of treaties. That gave the impression that the rules governing the interpretation of international instruments were becoming fragmented. Perhaps there was now a need to clarify the rules of interpretation that applied outside the realm of the law of treaties.

30. Mr. TOMKA (President of the International Court of Justice) said that the Court, in its advisory opinion on the *Accordance with International Law of the Unilateral Declaration of Independence with respect to Kosovo*, had formulated certain rules concerning the interpretation of the resolutions of international bodies such as the Security Council. The rules for the interpretation of unilateral acts, to which the law of treaties did not apply, might be a topic for possible consideration by the Commission, but it would not be an easy topic.

31. Mr. HASSOUNA asked whether the imminent appointment of new members of the Court would slow down the adjudication of pending cases. He wished to know what steps would be taken to enable new judges to familiarize themselves with those cases. Although all the judges had to be neutral and objective, he wondered whether their national cultural and legal background influenced their approaches and their opinions on the Court's final judgments.

32. Mr. TOMKA (President of the International Court of Justice) said that as soon as they were elected, the new judges would receive case files in order to prepare themselves for hearings. Judges had to recuse themselves only if they had previously acted in the capacity of agent or counsel for one of the parties to a case. Nationality did not

[255] G. Gaja and J. Grote Stoutenburg (eds.), *Enhancing the Rule of Law through the International Court of Justice*, Developments in International Law, vol. 68, Leiden, Brill Nijhoff, 2014.

constitute grounds for disqualifying a judge from participation in a case. It was possible that judges might have slightly different approaches owing to their legal background and education, but the nationality factor was neutralized by the fact that a panel of 15 judges examined each case. After the hearing, each judge had to prepare a note on the legal issues raised by the case and arrive at reasoned conclusions, to be presented at a meeting at which his or her reasoning could be challenged. That process guaranteed the impartial consideration of each case.

33. The CHAIRPERSON thanked Judge Tomka for his valuable insights and informative replies to questions.

Protection of the environment in relation to armed conflicts (*continued*) (A/CN.4/666, Part II, sect. F, A/CN.4/674)

[Agenda item 10]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

34. The CHAIRPERSON invited the Commission to resume its consideration of the preliminary report on the protection of the environment in relation to armed conflicts (A/CN.4/674).

35. Mr. PARK said that, in the Republic of Korea, environmental considerations were generally integrated into the decision-making of the armed forces in peacetime, although national security interests had led to certain legal exemptions and military regulations that favoured defence considerations over environmental concerns.

36. Referring to the methodology adopted by the Special Rapporteur whereby three phases were identified—before, during and after an armed conflict, or phases I, II and III—he said that most of the principles of international environmental law and human rights law that applied to phase I also applied to phases II and III. As phase I was technically considered peacetime, most of the peacetime rules and principles of international law also applied to it. It was therefore hard to see a meaningful distinction between peacetime and "preparation for potential armed conflict", or phase I. The military exemptions to environmental laws provided for in certain countries suggested that national security was sometimes valued over environmental interests; it was therefore likely that any new obligations introduced as *lex ferenda* would be resisted.

37. Given that the content, scope and addressees of any guidelines that the Commission produced on the topic would vary for each of the three phases, attention should be given to formulating a coherent set of rules and principles that could be applied consistently and effectively in each phase. As there was no strict dividing line between phases, it might be that the rules for different phases would blend into one another. Contrary to the suggestion made by the Special Rapporteur in paragraph 59 of her preliminary report, he thought that, rather than focusing on phases I and III in discussions of the topic, equal weight should be given to phase II. Although some international laws dealt with environmental protection in times of armed conflict, they were now outdated.

38. While he understood the Special Rapporteur's reluctance to address the protection of cultural heritage as part of the topic, to exclude cultural heritage and yet define "environment" to include aesthetic aspects of the landscape, as suggested by the reference to the latter's "characteristics", seemed inconsistent. The definition used in the 1993 Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment included property that formed part of the cultural heritage. The crux of the matter was whether "cultural heritage" constituted "environmental values". The use of the term "characteristics" appeared to refer not only to artifacts and cultivated land, but also to the values attributed by the public to the qualities of a certain area, in addition to natural resources. In refining the definition of "environment", therefore, the question of whether cultural heritage should be included in the notion of "characteristics of the landscape" needed to be discussed.

39. If, as the Special Rapporteur had proposed in paragraph 66 of her preliminary report, the Commission did not discuss the controversial issue of weapons separately as part of the topic, then it would be unable to deal with the environmental damage that might be triggered by nuclear, chemical and biological weapons. The existence of specific treaties dealing with different weapon types indicated that customized laws were needed in that regard. His preference would be for the outcome of the topic to be an "umbrella" formula that would be applicable to all such problems.

40. In paragraph 67 of her preliminary report, the Special Rapporteur noted that the issue of internally displaced persons and refugees should be approached cautiously. However, it did not seem directly relevant to the topic at hand and could give rise to a number of complicated legal questions, such as the environmental impact of massive population movements and claims for compensation for land.

41. With regard to the definition of "armed conflict", he agreed that adapting the definition used in draft article 2 of the draft articles on the effect of armed conflicts on treaties[256] to include situations in which an armed conflict took place without the involvement of a State would be the most appropriate course of action. However, to refer only to "organized" armed groups might be unnecessarily restrictive, as not every armed group involved in an internal conflict that negatively affected the environment would fall into that category. The qualifier "within a State" was also unnecessary, as many armed groups were organized transnationally. Irrespective of the difficulty of enforcing laws on individual groups that were not well organized, they should be included, especially as the Commission was aiming to produce guidelines rather than a treaty. However, the issue of how to enforce rules and principles effectively in peacetime against *de facto* politically independent entities that were out of control should be addressed, especially with respect to phase I.

42. Defining "environment" was not easy, as its scope varied depending on context. The definition used in the 2006 draft principles on the allocation of loss in the case

[256] General Assembly 66/99 of 9 December 2011, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2011*, vol. II (Part Two), pp. 107 *et seq.*, paras. 100–101.

of transboundary harm arising out of hazardous activities[257] was intended only as a working definition for that particular context. Instead of transposing a definition from a previous topic, the Commission should focus on determining the scope of the concept of "environment" in relation to armed conflicts, something that would be particularly relevant to the issue of compensation in phase III.

43. While the preliminary report was informative, it lacked an in-depth analysis of the actual application of the various principles of international environmental and human rights law described. Whether those principles were applicable in armed conflicts, and, if so, in which phases and in what way, were questions that should be tackled in the next report. Further consideration of other rules and principles was also recommended, although he had some reservations as to whether the issue of indigenous rights should be addressed separately.

44. Mr. MURPHY expressed doubt at the Special Rapporteur's conviction, set out in paragraph 24 of the preliminary report, that "a considerable number of States [had] legislation or regulations in force aimed at protecting the environment in relation to armed conflict". While most States had national environmental laws, it could not be assumed that a State's military forces were governed by such laws, at least in times of armed conflict. That was certainly not true of the United States, where numerous exemptions on national security grounds could be invoked with respect to military activities within the country. Moreover, most of its environmental laws were not interpreted as applying extraterritorially.

45. With regard to paragraph 47 of the preliminary report, he concurred that it was impossible to claim that a general, universal practice existed or to establish evidence of customary international law in that area. He expressed support for the Special Rapporteur's cautious approach, including her intention not to cover various matters that would considerably complicate the Commission's work on the topic, and to produce guidelines rather than draft articles. The working definitions provided were useful for framing the discussion, but they might not be needed in the final text. He noted that the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), and the Rome Statute of the International Criminal Court referred to "natural environment", not just "environment".

46. As was pointed out in paragraph 88 of the preliminary report, only a limited number of treaties directly regulated the protection of the environment in armed conflict. Most peacetime environmental treaties were silent on their operation during armed conflict or expressly provided that they did not apply in such situations.

47. It was not clear to what extent the Special Rapporteur saw the environmental and human rights concepts and principles set out in the preliminary report as legal rules of general applicability, nor what connection she was drawing between them and armed conflict. For example, it was difficult to see a connection between sustainable development and armed conflict. Assuming that some of the principles and concepts canvassed in the preliminary report did have a legal content relating to armed conflict, he took the view that the specific rules of *jus in bello* that expressly or indirectly protected the environment served as the application of those environmental principles and concepts. He stressed, however, that such *jus in bello* rules did not displace other rules of international law, and that *jus in bello* was not a self-contained regime.

48. Mr. ŠTURMA expressed support for the three-phase approach taken, but sought clarification as to what rules were particularly relevant to each of the three phases. It was difficult to see how the Commission could identify obligations concerning the protection of the environment in internal conflicts, which were not covered by existing international law, without developing rules, which would entail touching upon the law of armed conflict—despite the Special Rapporteur's statement that the Commission had no intention of modifying the law of armed conflict.

49. It might be too soon to indicate clearly what form the outcome of the topic should take, but it was important to know whether it would cover the obligations of States alone or also of non-State actors. If the latter was the case, then the customary international law that was binding on non-State organized armed groups would need to be identified. Although he supported the definition of armed conflict proposed in paragraph 78 *in abstracto*, its usefulness for the purposes of the topic would depend on who was bound by the obligations in question.

50. While he agreed with the Special Rapporteur's reluctance to address the protection of cultural heritage, he pointed out that the proposed definition of the environment might result in some overlap with the World Heritage List maintained by UNESCO; in addition, the definition might benefit from the inclusion of subsoil or underground spaces.

51. While welcoming the Secretariat survey of State practice and the reiteration of the Commission's previous work on related topics, he expressed concern that the key issue of the extent to which environmental principles and concepts might be applicable during armed conflict had not been addressed. Some of the principles set out in the preliminary report were not obviously relevant to armed conflicts; moreover, contrary to what the Special Rapporteur stated in her preliminary report, the "polluter pays" principle was not a principle of reparation of damage caused by an internationally wrongful act, but rather an economic and legal principle aimed at internalizing the costs associated with the use and pollution of certain parts of the environment, such as water or air. In his view, the link between human rights and the environment might provide the best way of connecting the three phases of the topic. Finally, given its complexity, more time would be required to work on the topic than the three years suggested by the Special Rapporteur.

The meeting rose at 1 p.m.

[257] See the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities adopted by the Commission at its fifty-eighth session and the commentaries thereto in *Yearbook … 2006*, vol. II (Part Two), pp. 58 *et seq.*, paras. 66–67. See also General Assembly resolution 61/36 of 4 December 2006, annex.

3229th MEETING

Wednesday, 23 July 2014, at 10 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Protection of the environment in relation to armed conflicts (*continued*) (A/CN.4/666, Part II, sect. F, A/CN.4/674)

[Agenda item 10]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to resume their consideration of the preliminary report on the protection of the environment in relation to armed conflicts (A/CN.4/674).

2. Mr. SABOIA said that, despite the existence of some non-binding declarations and decisions, general guidelines from ICRC and a few provisions in treaties, much law-making still needed to be done in order to protect the environment before, during and after armed conflicts. In her introduction, the Special Rapporteur had skilfully dealt with the coexistence, during armed conflicts, of the law of armed conflict, international humanitarian law and rules on environmental protection and human rights. Her proposal to divide consideration of the topic into three temporal phases (before, during and after the conflict) was welcome and, notwithstanding the diverging views expressed in that connection, it seemed reasonable to give priority to the first and third phases, where practice and legal material were less abundant.

3. He was in favour of including conflicts between organized armed groups within a State in the definition of "armed conflict", in line with the judgment in *Prosecutor* v. *Duško Tadić a/k/a "Dule"*, in order to cover non-international armed conflicts in which the State was not involved. The frequency of that type of conflict confirmed the need for just such a comprehensive definition. Iraq, Somalia and other African countries all offered examples of situations where non-State actors played a leading role in the conduct of hostilities from which the State was virtually excluded. It was therefore essential that non-State actors be bound by rules on environmental protection in times of conflict. The proposed definition of "environment" was interesting, but it should also include the human dimension in order to clarify the linkage between a clean environment and the survival and sustainable development of humanity. Indigenous peoples were particularly vulnerable since their traditional way of life was close to nature.

4. Lastly, as far as sources were concerned, it would be useful to examine United Nations practice in protecting civilians during operations mandated by the Security Council. The work of the Peacebuilding Commission might also be of relevance when analysing the relationship between environmental damage, poverty, political tensions and internal armed conflicts.

5. Mr. NIEHAUS agreed with the Special Rapporteur that the approach to the topic must include not only *lex specialis* (the law of armed conflicts), but also other applicable fields of international law, such as environmental law and human rights law. He, too, was in favour of dividing the topic into three phases, but was not sure that one phase should be regarded as more important than another, especially as it was difficult, if not impossible, to draw a dividing line between them. Even if, logically speaking, preventive action before a conflict would offer the most efficient protection, many other measures could be adopted during and after a conflict. In any event, it was essential to emphasize, as the Special Rapporteur had done, that the Commission did not intend to modify the law of armed conflict, and it evidently had no reason to examine the root causes of armed conflicts.

6. On the other hand, he was not in favour of excluding protection of cultural heritage simply because it was already regulated by specific conventions, namely those of UNESCO, since those conventions were far from effective. The notion of "cultural heritage" should at least be revisited and the pertinent international provisions should be assessed. Nor was it logical, as Mr. Park had already pointed out, to exclude the cultural heritage from a definition of the environment that mentioned "characteristic aspects of the landscape".

7. However interesting the question of weapons might be, it seemed premature to consider it at that stage of deliberations. Great caution would be required when considering the issue of refugees and displaced persons. The analysis contained in chapters X and XI of the preliminary report (environmental principles and concepts, and human rights and the environment, respectively) would be most helpful throughout work on the topic. In particular, the idea that a healthy environment had a bearing on the enjoyment of human rights was gaining ground, as was evidenced by the international community's positive response to the topic under consideration and to that of the protection of the atmosphere. Lastly, like other members, he thought that the timetable proposed by the Special Rapporteur was too short.

8. Mr. EL-MURTADI SULEIMAN GOUIDER welcomed the preliminary report on the protection of the environment in relation to armed conflicts, which had advanced the work on the topic that had begun in 2011. It had to be remembered, however, that opinions within the Commission and the Sixth Committee were sharply divided as to the priority to be given to each of the three phases of protection. It would seem from paragraph 167 of the preliminary report that, in her following report, the

Special Rapporteur would focus on the second phase—during the conflict—perhaps at the expense of the other two. It was, however, obvious from the proliferation of conflicts around the world that the pre-conflict phase must not be neglected. In any event, it would be necessary to clarify the respective importance of the three phases, especially as the dividing line between them was not always crystal clear or immutable.

9. State practice also required closer scrutiny and, for that reason, it was to be hoped that more States would provide examples thereof. Many States had embodied environmental protection in their constitution, or in their legislation, and that protection, even if it was not necessarily associated with armed conflicts, applied at all times. Exchanges with other bodies should be encouraged, because the paucity of information on the topic under consideration was a big stumbling block. As far as the next stages of work were concerned, it would be helpful if the Special Rapporteur were to explain why she did not intend to cover situations where environmental pressure, including the exploitation of natural resources, triggered an armed conflict, especially as she acknowledged their significance. More thought should be given to the form of the outcome of work, it being understood that the final decision would lie with the General Assembly.

10. Ms. ESCOBAR HERNÁNDEZ approved of the Special Rapporteur's proposal to adopt a temporal approach to the topic, for it would bring out the fact that armed conflict could damage the environment not only on account of acts committed during hostilities, but also because of States' earlier action connected with military planning and the management of military activities outside a conflict (such as manoeuvres), or as a result of rules established in peacetime, such as rules of engagement, which might have an impact on the environment. That approach would likewise make it possible to demonstrate that hostilities could often have lasting repercussions on the environment that might impede post-conflict recovery and thus affect the population.

11. The division of the topic into temporal phases presupposed the identification of the actors at each stage and the rules or principles of public international law which applied to them. In that connection, the Special Rapporteur seemed to have taken the correct decision to consider the international legal system as a whole throughout all three phases in order to avoid the effects of fragmentation. Similarly, she had rightly elected to deal with the issue of human rights and the environment not as a new human right, but as a nexus of rights, the purpose of which was the enjoyment of a healthy environment. Although that approach was more difficult, it was appropriate from the legal and technical point of view. Indigenous peoples warranted special treatment when considering the topic, as did refugees.

12. The definition of "armed conflict" proposed in the preliminary report was sufficiently broad, but it was unclear why only non-international conflict was qualified by the adjective "protracted". The definition of the environment could include the notion of "cultural heritage", which encompassed all aspects of the landscape, both natural and human-made. In conclusion, she found the proposed timetable of work rather short, especially if the preventive phase of environmental protection was going to be investigated in greater depth in subsequent reports.

13. Sir Michael WOOD said that the Commission must keep to the topic as it had been defined and not address undecided and often controversial questions of environmental or human rights law, or the rights of indigenous peoples. It was not for the Commission, under this topic, to decide whether sustainable development was a concept, a principle or a principle of international law, or to revisit the law on environmental protection. Similarly, as stated by the Special Rapporteur in paragraph 66 of her preliminary report, the Commission must not address the issue of the effects of certain weapons, for that was a complex and controversial matter that had traditionally been subject to negotiations between States. On the other hand, she must endeavour to identify the rules and principles applicable in peacetime that were of some relevance to the topic, which was not an easy task.

14. The preliminary report concerned the first phase of the protection of the environment in relation to armed conflicts and the Special Rapporteur apparently intended to tackle the other two phases in her subsequent reports, but she did not specify whether she intended to propose guidelines with respect to the first phase. She rightly referred to the Commission's work on the effects of armed conflicts on treaties,[258] which expressly addressed the status of treaties related to the international protection of the environment. It was, however, less certain that she was correct in saying that those draft articles, in particular draft article 3, enunciated a presumption that the existence of an armed conflict did not *ipso facto* terminate or suspend the operation of treaties. Draft article 3 did not enunciate a presumption; it was a statement. For that reason, it was hard to see how it could serve as a point of departure, because it said nothing about the actual continued application of treaties during an armed conflict, merely that they are not *ipso facto* terminated or suspended.

15. Some terms and expression required clarification, namely the terms "principles" and "rules", which were used variously in the report, while the expressions "principles and concepts" or "rules and principles" were obscure, to say the least. Although a distinction was drawn in the report between "political concepts" and "legal principles", both expressions were used pretty much indiscriminately. Could it be said that a "concept", which was apparently a political idea and not a legal rule, was a "candidate for continued application during armed conflict"?

16. The scope of the topic was not clearly delimited; differing points of view had been expressed on that subject in the Sixth Committee. It was to be hoped that the Special Rapporteur agreed that the topic under consideration must not serve as a pretext for undertaking a general study of the legal status of rules of international environmental law. Even if he was unsure how the division of the topic into three phases would work in practice, he agreed with the Special Rapporteur that the emphasis should be on the

[258] General Assembly 66/99 of 9 December 2011, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2011*, vol. II (Part Two), pp. 107 *et seq.*, paras. 100–101.

first and last phases. There were already plenty of rules and practice related to the period of armed conflict itself and it was not the Commission's task to amend them. As far as the use of terms was concerned, if the Commission decided to include a definition of "armed conflict" in its draft text, it should encompass all types of armed conflict.

17. It was understandable that the Special Rapporteur preferred not to draw hasty conclusions as to the relevance or applicability of "environmental principles and concepts" in armed conflicts and intended to confine herself to determining whether they might remain applicable. However, she ran through them without saying how they fitted into the context of the topic. Moreover, it was unclear whether the principle of sustainable development was of immediate relevance to the topic, and doubtful whether it was applicable in armed conflicts. The same was true of the case law of the WTO Appellate Body. It was somewhat surprising that, when the Special Rapporteur referred to the case concerning *Balmer-Schafroth and others* v. *Switzerland*, she cited only the opinions of the dissenting judges and not the judgment of the European Court of Human Rights. The legal character of human rights was indeed different from that of the rules of international environmental law, which was why they might be of limited usefulness for the topic. Lastly, with regard to the future programme of work, he was pleased that the Special Rapporteur intended to prepare a more analytical, concrete second report and he supported her proposal to draw up non-binding guidelines.

18. Mr. HASSOUNA approved of the Special Rapporteur's step-by-step approach to the topic under consideration, which was certainly complex, since it concerned various international law regimes and drew on very similar, overlapping principles and concepts. Although they were inherently vague and imprecise, those principles and concepts did exist and had to be coordinated and made central to any guidelines that were formulated.

19. The Special Rapporteur understandably wished to limit the scope of the topic for practical, procedural and substantive reasons. However, in view of the fact that pressure on the environment and movements of refugees or displaced persons were both the result and the cause of armed conflict, it might be useful to pay some attention to them. The issue of certain types of weapons could be dealt with in the commentary to the draft guidelines, by explaining that considerations regarding them were without prejudice to the rules and conventions applying to them.

20. He approved of the Special Rapporteur's intention to base the definition of the notion of "armed conflict" on the articles on the effects of armed conflicts on treaties; the proposed definition seemed consonant with that given in the Rome Statute of the International Criminal Court. Reference to non-international armed conflicts was warranted in light of the aim and purpose of the work, because armed conflicts, international or otherwise, were likely to have harmful consequences on the environment. It could also be made plain that, for the purpose of the topic, armed conflict presupposed a certain level of organization and intensity. Those were the criteria normally used for interpreting common article 3 of the 1949 Geneva Conventions for the protection of war victims. Failing that, it should at least be made clear that internal disturbances and tension taking the form of riots, isolated and sporadic acts of violence, or other similar acts, were not regarded as armed conflicts. If the guidelines covered all three phases of armed conflict, it would also be essential to establish criteria for determining when a conflict began and ended.

21. He approved of the Special Rapporteur's approach to defining the environment and her definition of it, especially as it mentioned natural resources. He welcomed the consultation of organizations operating in various fields of international law, such as ICRC. It would be interesting to know what the Special Rapporteur thought of its controversial study of the rules of customary international humanitarian law, which had been published in 2005.[259]

22. The Special Rapporteur identified five environmental principles and concepts that were likely to remain applicable during armed conflicts, and said that the extent to which they applied would be addressed later. The legal status of most of them, including the principle of sustainable development, was uncertain and, at first sight, those principles and concepts did not seem to fall within the ambit of customary international law. In the interests of the progressive development of international law, the Special Rapporteur should therefore spell out in her following report the implications of those principles in an armed conflict in order to maximize the proposed guidelines' usefulness in practice.

23. The legal status of the concept of sustainable development was controversial and its relevance to the topic was questionable, for it generally applied in a context very different to that of armed conflict. The examples given in the preliminary report of the principles of prevention and precaution were mainly drawn from European experience. The practice followed in other regions, such as North America, should also be explored. In order to illustrate the relationship between the environment and international human rights law, the examples quoted in the preliminary report could be supplemented with article 24 of the African Charter on Human and Peoples' Rights, which stated that "[a]ll peoples have the right to a general satisfactory environment favourable to their development".

24. When asking States for further information, the Commission should specify that information on practice in peacetime would also be helpful. The initial request gave the impression that the first phase preceding the conflict was not covered. Lastly, he considered that the outcome of the Commission's work on the protection of the environment in relation to armed conflicts should take the form of practical guidelines.

25. Mr. GÓMEZ ROBLEDO approved of the Special Rapporteur's method of identifying the rules and principles applicable before, during and after an armed conflict, and he endorsed Mr. Murase's proposal that the Commission focus on the second phase. The first question that had to be asked was whether the natural environment had to be regarded as a legal asset and protected as

[259] J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, vol I, *Rules*, vol. II, *Practice* (2 Parts), Cambridge University Press, 2005.

such, as was cultural property under the Convention for the Protection of Cultural Property in the Event of Armed Conflict, or whether it was protected only insofar as was necessary for the subsistence of the civilian population in wartime. In order to elucidate the linkage of the environment and human rights, the Special Rapporteur should examine how those rights had been construed by regional courts in cases concerning the natural environment. The recent case law of the Inter-American Court of Human Rights was of interest in that respect.

26. In order to determine which rights remained applicable during an armed conflict, the Special Rapporteur could distinguish between rights stemming exclusively from international humanitarian law, rights stemming exclusively from human rights instruments and rights deriving from both bodies of rules, as the International Court of Justice had done in the advisory opinion it had issued in 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

27. The issue of the application of the principles of prevention and precaution during an armed conflict must be treated with great caution, as must the principle of sustainable development, which had prompted a lively debate among Member States of the United Nations, as well as the question of whether it was really a legal principle. Before defining the notion of "environment", it would first be wise to determine whether the way in which it was interpreted differed in peacetime and wartime, in other words, if it was interpreted more broadly to encompass the human environment in peacetime and if it was confined to the natural environment in wartime. Another question that had to be explored was whether there were any customary obligations to protect the environment during an armed conflict irrespective of whether it was international. In the advisory opinion that it had issued in 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice had held that article 35, paragraph 3, and article 55 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), which set forth the obligation to protect the natural environment, were powerful constraints for all States which had subscribed to those provisions. It would be helpful to determine what types of obligations were incumbent upon non-State actors in the event of a non-international armed conflict, especially as the obligation to protect the environment was not mentioned in the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II). In the same advisory opinion, the International Court of Justice had noted that States must take environmental considerations into account when assessing what was necessary and proportionate in the pursuit of legitimate military objectives, and had found that respect for the environment was one of the elements that went into assessing whether an action was in conformity with the principles of necessity and proportionality. The Special Rapporteur should base herself on that finding and identify the provisions of international environmental law that applied during an armed conflict. For example, it would be useful to know whether the principles of international humanitarian law regarding the protection of the civilian population were also applicable to the protection of the natural environment. That would make it possible to determine whether the principle of distinction, which prohibited deliberate attacks on the civilian population, also prohibited deliberate attacks on the natural environment. As for the principle of proportionality, it would be necessary to investigate the question of how to assess "excessive" collateral damage to the natural environment, which presupposed finding out whether the natural environment had to be protected as such, or insofar as it contributed to the subsistence of the civilian population.

28. Mr. VALENCIA-OSPINA approved of the method employed by the Special Rapporteur and agreed that the Commission's work must concern not only the first and third phases of armed conflict, but must also focus on the second. The sixth report on the protection of persons in the event of disasters[260] comprised a detailed analysis of the principle of prevention under international law and referred to numerous sources with regard to the international duty to cooperate for preventive purposes.

29. The report under consideration called for several general comments. First, contrary to her statement in paragraph 49 of her preliminary report, in chapter IX on the relationship with other topics addressed by the Commission, the Special Rapporteur mainly studied the provisions applicable in times of armed conflict, in other words, those which concerned the second and not the first phase. Second, she did not clarify the criteria for determining when the principles of international environmental law might apply during an armed conflict, and she ignored other relevant principles such as the principle of "common but differentiated responsibilities", of cooperation or of access to information and access to justice on environmental matters. Third, apart from the principle of due diligence, she did not really explain why the principles she had identified were of relevance to the first phase. The relationship between those environmental principles and the rules of international humanitarian law on the measures that had to be taken before the outbreak of an armed conflict could have been touched upon. To mention just one example, the obligation set forth in article 36 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) concerned the first phase. It had to be noted that, in accordance with that article's reference to "any other rule of international law applicable to the High Contracting Party", the rules and principles of international environmental law had to be taken into consideration when new weapons, means and methods of warfare were developed. Article 35, paragraph 3, and article 55, paragraph 1, of the same Protocol, related to the protection of the natural environment against widespread, long-term and severe damage caused by methods or means of warfare, were also of relevance.

30. Turning to more specific aspects of the preliminary report, he emphasized with reference to the obligation to conduct environmental impact assessments that, in its judgment in the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, the International Court of Justice had considered that such an obligation

[260] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/662.

existed under general international law when there was a risk that industrial activities might have a significant adverse impact in a transboundary context. In addition, in its advisory opinion on *Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area,* the International Tribunal on the Law of the Sea had confirmed the customary nature of that obligation, and had held that it might also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction and to resources that were the common heritage of mankind. Moreover, in paragraph 161 of the preliminary report, the Special Rapporteur stated that decisions within the inter-American system did not appear to implicitly reference principles of environmental law. However, in the judgment it had rendered in the case of the *Saramaka People* v. *Suriname,* the Inter-American Court of Human Rights had established the duty of States to conduct an environmental impact study in the context of extractive activities in the territory of indigenous groups. It had specified, in its judgment in the case of the *Kichwa Indigenous People of Sarayaku* v. *Ecuador* in 2012, the content of that duty on the basis of article 7, paragraph 3, of the International Labour Organization Convention (No. 169) concerning indigenous and tribal peoples in independent countries. Although generally speaking it was true that human rights law guaranteed the rights of the individual, while international environmental law focused on inter-State relations, in recent years those two areas had drawn closer together. Some principles of international environmental law had been incorporated into the field of human rights and vice versa. For example, the rights to access to information, public participation in the decision-making process and access to justice in environmental matters, which had originated in international human rights law, had been recognized in the Aarhus Convention and in the North American Agreement on Environmental Cooperation. Although they were international environmental law instruments, they established mechanisms enabling individuals to file claims that their provisions had not been enforced. As other members of the Commission had said earlier, the various procedural obligations that had been mentioned, including the obligation of conducting environmental impact studies, might be of relevance in the context of an armed conflict. Lastly, he supported the Special Rapporteur's proposed definitions of the terms "armed conflict" and "environment", subject to their revision at a later stage of the work.

31. Mr. WISNUMURTI said that he completely agreed with Mr. Murase that the Commission's work should focus on the second phase of the temporal approach chosen by the Special Rapporteur and not, as she proposed, on the first and third phases. He had been one of the members who had expressed that viewpoint during the consultations in 2013. It was regrettable that the Special Rapporteur had not borne it in mind sufficiently, especially as she recognized that it was impossible to draw a clear-cut dividing line between the three phases and that, as work progressed, the rules pertaining to them would tend to blend into one another. For that reason, they should be accorded the same weight. As far as the second phase was concerned, some principles of and rules on environmental protection during armed conflicts had already been embodied in the Convention on the prohibition of military or any other hostile use of environmental modification techniques and in Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I). The emergence of new kinds of armed conflicts and their impact on the environment meant that further efforts must be made to adopt rules, guidelines or conclusions that specifically addressed that question.

32. While the scope of the topic under consideration must include protection of the cultural heritage, in order to fill any gaps in the legal instruments on the subject which had been adopted by UNESCO, he agreed with the Special Rapporteur that the root causes of armed conflicts and the effects of particular weapons must be excluded. On the other hand, the repercussions on the environment of movements of refugees and displaced persons should be examined, albeit with great caution. He did not understand why the Special Rapporteur appeared to exclude international armed conflicts from the analysis of the second phase and why she wished to focus on non-international armed conflicts.

33. The phrase added to the definition of "armed conflict" by the Special Rapporteur was unnecessary, for the provision which she had taken as her basis already covered non-international armed conflicts. The proposed definition of "environment" was too narrow to encompass all the aspects of the environment that might be affected by an armed conflict and, as it was non-exhaustive, it might give rise to diverging interpretations. Lastly, he failed to see how the concepts and principles examined in chapter X of the preliminary report could apply directly to the protection of the environment in relation to armed conflicts. They required further discussion.

34. Mr. FORTEAU said that he fully subscribed to the comments made by Mr. Šturma. The preliminary nature of the Special Rapporteur's report and the fact that it scarcely went beyond the threshold to the topic meant that it was premature to adopt a substantive position. While chapters IX and IV were most instructive, as Mr. Niehaus had said, it would be advisable to determine to what extent the practice of States and the international organizations mentioned was representative of contemporary general practice. Similarly, it would be wise to clarify the weight to be given to national courts' practice. On the other hand, the definitions proposed in chapter VII seemed to be appropriate as they stood.

35. The temporal approach adopted by the Special Rapporteur as the sole method of addressing the topic did not seem suitable, because a number of questions, including that of responsibility, could arise in each of the three phases. Similarly, the criterion of "peacetime/wartime" used to identify the rules and principles of relevance to the topic seemed to be ambiguous and simplistic, for some conventions concerning environmental protection applied in both instances, while others excluded any application to military matters, even when it came to preventive aspects. For that reason, a thematic approach should be added or adopted in preference to the temporal approach. In other words, the only way to arrive at the nub of the topic was to begin by determining, subject by subject, what existing rules, what instruments or what general principles of environmental law were likely to apply to the environment

in relation to armed conflicts, rather than repeating general principles of environmental law some of which, such as sustainable development, might well not apply to armed conflicts. In that respect, the preliminary report kept the Commission on tenterhooks. That was particularly true of chapter X of the report. Only once the relevant material had been gathered on the extent to which existing rules on environmental law applied to armed conflicts would it be possible to decide what codification, or progressive development, could be contemplated. Moreover, the Special Rapporteur should specify which of those exercises was expected of the Commission.

36. Mr. PETRIČ said that the main problem posed by the topic under consideration was that of points of convergence between international environmental law and the law of armed conflict. It was regrettable that the States particularly concerned by current or recent armed conflicts had hardly responded to the Commission's request for information on their practice and case law in that sphere.[261] He therefore supported the Special Rapporteur's proposal to renew the invitation that had been addressed to them and, perhaps, to make the request more specific.

37. With regard to the first phase of protection of the environment in relation to armed conflicts, defence and preparations for international conflicts on the one hand and military interventions abroad on the other were usually the two chief concerns of States, above all those in the West, and for that reason there was abundant legal material on those matters. That was not the case with regard to preparations for potential internal armed conflicts, whether or not they involved Governments, for States were reluctant to contemplate their occurrence. There was therefore little practice in that area, hence thinking in terms of progressive development would be warranted.

38. The three-phase approach was the right way to address the topic and he supported the idea of devoting an initial report to the first phase. He believed that, notwithstanding that methodology, the Special Rapporteur had basically opted for a comprehensive approach to the topic—the only one that was suitable bearing in mind the long-lasting nature of some conflicts—for she recognized that there was no clear-cut division between those phases. While the Special Rapporteur rightly excluded the causes of conflict from the scope of the topic, it was regrettable that she also excluded the cultural heritage. The question of the use of certain weapons that had a critical impact on the environment should not be completely ignored, and the matter of refugees and displaced persons should not be neglected either, since human rights were a dimension of the topic.

39. In principle and on a provisional basis, he approved of the proposed definition of the term "armed conflict" and endorsed Mr. Hassouna's comments with regard to the criteria of the intensity and duration of conflicts between armed groups within a State. The legal consequences of those conflicts, especially responsibility for any damage caused, should be examined. The definition of the term "environment" was acceptable, but it would be wise to clarify the link between characteristic aspects of the countryside and the cultural heritage.

40. With regard to chapter X, he agreed with the members of the Commission who considered that it would be inadvisable to enter into a discussion of the legal status or the nature of principles and concepts related to the environment as such, and that it would be wiser to study the manner in which they applied and their role in the event of an armed conflict, because they were really designed for peacetime. The same was true of human rights, which played a crucial role in the event of a conflict although they had also been formulated for normal circumstances. In that respect, it was regrettable that the Special Rapporteur mentioned only indigenous peoples without paying any attention to other minorities, especially as she excluded refugees and displaced persons from the scope of the topic. It did not seem advisable for the Special Rapporteur to deal with the very extensive subject of the protection of the marine environment in her second report. He would welcome some clarification on that point.

The meeting rose at 1 p.m.

3230th MEETING

Thursday, 24 July 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Cooperation with other bodies (*concluded*)*

[Agenda item 14]

Statement by representatives of the African Union Commission on International Law

1. The CHAIRPERSON welcomed the representatives of the African Union Commission on International Law (AUCIL) and invited them to present developments in the work of AUCIL in areas of common interest.

2. Mr. THIAM (African Union Commission on International Law) said that the establishment of AUCIL had been prompted by the objectives and principles set forth in articles 3 and 4 of the Constitutive Act of the African Union, which underscored the importance of accelerating the African continent's socioeconomic development by promoting research in all fields. One of the chief aims of AUCIL was to strengthen and consolidate the principles of international law and to work out common approaches to its development, while constantly endeavouring to maintain high standards in major fields of international law.

[261] See *Yearbook … 2013*, vol. II (Part Two), p. 15, para. 28.

* Resumed from the 3228th meeting.

3. Its principal mandate as an independent advisory organ of the African Union, as set out in articles 4, 5 and 6 of its statute, was to promote the codification and progressive development of international law in Africa, to assist in the revision of existing treaties, to identify areas where new treaties were required and to prepare drafts thereof, to conduct studies on matters of interest to the African Union and its member States and to encourage the teaching, study, publication and dissemination of literature on international law, in particular on the laws of the African Union and the peaceful resolution of conflicts.

4. AUCIL held two ordinary sessions a year and could convene for extraordinary sessions at the request of its Chairperson or of two thirds of the membership. It published the AUCIL *Yearbook* and the AUCIL *Journal of International Law* and was preparing to publish a digest of the case law and practice of member States, international legal texts regarding the regional economic communities, the case law of regional courts, the *travaux préparatoires* of African Union treaties and such diplomatic correspondence as could be made public.

5. It was currently undertaking studies on the juridical bases for reparation for slavery, the delimitation and demarcation of borders in Africa, the harmonization of ratification procedures within the African Union, international environmental law in Africa, the principle of the intangibility of borders in Africa, comparative mining law and the law regarding the oil industry.

6. At the request of the African Union, it had also supplied opinions on Security Council resolutions 1970 (2011) of 26 February 2011 and 1973 (2011) of 17 March 2011, the definition of the crime of unconstitutional change of Government, relations with the International Criminal Court and the establishment of an international constitutional court.

7. Every year, AUCIL organized a two-day forum on international law, with the participation of eminent experts, offering an opportunity to exchange views, to heighten an awareness of African Union law and to identify suitable means of accelerating regional integration throughout the continent. The theme of the first forum had been international law and African Union law, while the second forum had examined the law of regional integration in Africa and the role of the regional economic communities as forerunners of a genuine African Economic Community. While not all the latter entities had achieved the same level of integration, they were all striving towards that goal. The theme of the third forum would be the codification of international law at the regional level.

8. Article 25 of its statute enjoined AUCIL to engage in close collaboration with the Commission. A draft memorandum of understanding presented to the Commission at its sixty-fifth session was meant to be the basis for discussion on how to deepen cooperation between the two commissions through exchanges of views, publications and information and a multifunctional database that could be consulted by both commissions and their members.

9. Mr. KAMTO welcomed the news of the forthcoming publication of an AUCIL digest, which would provide the Commission with information about African practice. He wished to know whether AUCIL had been consulted with regard to the revision of article 46A *bis* of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, which was the article on immunity, or if it intended to provide an opinion thereon in order to guide the African Union in that field.

10. Mr. KITTICHAISAREE asked whether AUCIL had engaged in analysis of a new international economic order like the one proposed in the 1970s, which would put Africa equitably on the economic and political map. He also wished to know whether African Union States were now strictly enforcing the prohibition of female genital mutilation in the wake of the African Union's decision to support a General Assembly resolution on that subject.[262]

11. Mr. WAKO said that the Commission and AUCIL would greatly benefit from cooperation in the progressive development and codification of international law. He therefore commended the idea of the digest as a source of information about State practice in Africa. He wished to know whether, in the context of its work on mining law, AUCIL would seek to ensure that African countries benefited from the rich resources with which they were endowed. He also wished to know how AUCIL stood on giving the African Court of Justice and Human and Peoples' Rights wider jurisdiction to deal with the types of crimes that currently fell within the jurisdiction of the International Criminal Court. Would the competence of AUCIL to provide opinions conflict with the mandate of the African Court of Justice and Human and Peoples' Rights to render advisory opinions?

12. Mr. THIAM (African Union Commission on International Law) said that AUCIL had not been formally consulted about the revision of article 46A *bis* of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. The question of the immunity of Heads of State and State officials had been raised at a recent meeting held in Kenya in order to review the African Union's relationship with the International Criminal Court. The Chairperson of AUCIL was looking into the immunity of State officials under the Rome Statute of the International Criminal Court. His studies would result in the publication of a report setting out the position of AUCIL on that matter.

13. The erosion of Africa's strength on the international scene currently made it unthinkable to discuss a new international economic order in the terms in which it had been conceived in the 1970s. Any fresh debate of the subject, encompassing the aspirations of what had once been called the "non-aligned countries", would have to rest on new parameters and would have a different thrust.

14. Despite the fact that female genital mutilation met with growing international condemnation, few national legislatures in Africa had dared to establish and enforce

[262] Decision on the support of a draft resolution at the Sixty-sixth Ordinary Session of the General Assembly of the United Nations to ban female genital mutilation in the world (Assembly/AU/Dec. 383(XVII)); available from the website of the African Union: https://au.int.

a ban on that practice. Senegalese courts applied criminal law to severely punish individuals or groups who engaged in the practice, but they did so with little enthusiasm. Attempts were being made, with the support of the international community, to create an awareness of the fact that female genital mutilation was a crime and to help its practitioners to find another occupation. Nevertheless, African States still had much to do regarding the prohibition and punishment of female genital mutilation.

15. In 2013, at the Second Forum of the African Union on International Law and African Union Law, which focused on the law of regional integration in Africa, the Chairperson of the African Union Commission had expressed regret that Africa was still ill equipped to protect its own heritage and resources, including energy resources, and was inclined to turn to private international entities for assistance. Lack of experience in preparing regulations and the defence by private entities of their interests meant that domestic legislation was frequently weak. The Chairperson had asked AUCIL to work on the matter, so that Africa could start to use its own human resources to manage its energy resources and other natural assets. AUCIL had begun to consider the topic and would make proposals in the near future, highlighting the need to protect the natural resources of Africa, particularly in the mining and energy sectors. Legislation across Africa varied widely, often having different objectives; improved coordination among countries might yield more coherent results.

16. The proposed amendments to the Protocol on the Statute of the African Court of Justice and Human and Peoples' Rights concerning the issue of immunity for high-level State officials were certainly controversial, and likely to remain so. As to the International Criminal Court, opinion among States parties to the Rome Statute on the International Criminal Court was divided concerning immunity from criminal jurisdiction for Heads of State.

17. Establishing close collaboration between AUCIL and the Commission was mentioned as an obligation in the AUCIL statute and formed a fundamental part of its work. Africa was not seeking to strike out on its own in the field of international law, but rather to contribute to international efforts. The International Law Commission paved the way for the work of regional bodies such as AUCIL; concerted action would help to achieve the objectives of general and regional international law.

18. Mr. EL-MURTADI SULEIMAN GOUIDER asked whether there were any plans to create a specific mechanism to channel cooperation with the Commission and what impact the guidelines produced by AUCIL had on the work of the African Union and the other bodies to whom they were addressed.

19. Mr. HASSOUNA asked whether the four weeks for which AUCIL met each year were sufficient to discuss all the topics on its agenda; whether all of its reports and other documentation were available on its website or could be sent directly to the Commission; and whether there were plans for cooperation with other regional and national bodies within Africa that worked in the field of international law.

20. Sir Michael WOOD, welcoming the proposed digest of African State practice, emphasized the costly nature of such a project and expressed the hope that sufficient human and financial resources would be made available. He requested further information on the forthcoming forum on codification, including what themes it might tackle, and suggested that AUCIL might make more information on its work available on its website.

21. Mr. SABOIA said that the issue of reparations for slavery had been hotly debated at the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, which had concluded that the slave trade was equivalent to a crime against humanity.[263] Most countries in the Americas had been both victims and perpetrators of slavery. He requested further information on the direction that the work being done by AUCIL on the subject was taking.

22. Mr. THIAM (African Union Commission on International Law) said that, in cases where AUCIL and the Commission were working on related or overlapping topics, it would be useful for their respective special rapporteurs to exchange views as a means of coordinating the work and avoiding duplication, while maintaining the specific aspects of each and achieving the best result possible. A permanent mechanism for that purpose was urgently required.

23. Significant demands were made of the 11 members of AUCIL: not only did they meet for a relatively short time each year, but in addition to international law topics, they also had to discuss administrative, technical and financial matters. Extraordinary sessions had been considered as a means of increasing the time available, but there were budgetary implications. AUCIL was constantly seeking contributions from donors to facilitate its work. The complex and wide-ranging topics it covered entailed a heavy workload.

24. Acknowledging that the AUCIL website could be made more informative, he said that it had recently been decided to update it on a continual basis. AUCIL reported regularly to the organs of the African Union. Although those reports did not contain detailed accounts of the legal content of its discussions, they gave a useful overview of its work. AUCIL had not yet established close cooperation with all the new international law bodies that were emerging in Africa, but a growing number of interested organizations, including universities and research institutes, were involved in its work every year. It was hoped that this trend would continue. Support from more experienced bodies working in the sphere of international law would be very beneficial to AUCIL as it embarked on its project to create a digest of African State practice, and he welcomed the comments made by Sir Michael in that respect.

25. The issue of slavery was extremely delicate. Frankness and transparency were vital to constructive discussions. The AUCIL Special Rapporteur on the subject had chosen to focus on reparations, exploring that aspect of the

[263] See the Declaration of the Conference, Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (A/CONF.189/12), chap. I, para. 13.

topic in detail. There were many factors to be taken into account, especially as the attribution of responsibility was not always straightforward. After three years, work was still being done on the topic; the members of AUCIL were keen to ensure the most rigorous possible outcome. Some countries in Africa were firmly opposed to the notion of financial compensation, but were prepared to consider reparations in a range of symbolic forms. Others espoused different views. The issue was complex and must be approached carefully, but also boldly and transparently.

Protection of the environment in relation to armed conflicts (*continued*) (A/CN.4/666, Part II, sect. F, A/CN.4/674)

[Agenda item 10]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

26. The CHAIRPERSON invited the Commission to resume its consideration of the preliminary report of the Special Rapporteur on protection of the environment in relation to armed conflicts (A/CN.4/674).

27. Mr. PETER said that it was too early in the Commission's consideration of the topic to discuss what form the output of its work should take; the Special Rapporteur should be granted plenty of leeway in that regard. The first paragraph of the report captured the essence of the topic and provided an excellent starting point. On the other hand, in her discussion of the environmental policy of United Nations peacekeeping missions in paragraphs 43 and 44 of her preliminary report, the Special Rapporteur failed to mention an incident in Haiti, where, following the 2010 earthquake, a cholera outbreak that had taken thousands of lives and infected hundreds of thousands had been attributed to the presence of the peacekeeping forces.

28. In chapter X of the preliminary report, which concerned human rights and the environment, the Special Rapporteur unduly emphasized the individual enjoyment of rights and disregarded the dynamic nature of rights and the emergence of new concepts within human rights. The denial of the close connection that existed between the environment and human rights and the rejection of the right to a clean environment as a human right reflected an old school of legal thought. For the Commission to adopt that thinking would guarantee its irrelevance in international circles, given that the tide was moving in a different direction. Many linkages had, in fact, been made between the protection of human rights and the protection of the environment. The Stockholm Declaration was one example. It stated that: "Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights—even the right to life itself."[264]

29. He was surprised at the Special Rapporteur's assertion in paragraph 157 of her preliminary report that there had to be a customary law rule establishing an individual human right to a clean environment, in the absence of which such a right did not exist. As a matter of fact, the right to a clean environment had been codified in several international conventions, including the African Charter on Human and Peoples' Rights (art. 24). In Europe, the right to a clean environment had been recognized on the basis of an indirect interpretation by the European Court of Human Rights of article 8 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms.

30. He was surprised, too, at the Special Rapporteur's conclusion in paragraph 163 that references to principles of environmental law in human rights were "uncommon" and "fleeting". That seemed to contradict the footnote to paragraph 157, where she listed two important legal instruments, the African Charter on Human and Peoples' Rights and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights: "Protocol of San Salvador", which established a link between a clean environment and the enjoyment of human rights. Surely such efforts to incorporate environmental law into human rights discourse counted for more than fleeting references. Those instruments reflected a new way of thinking in human rights circles, which could be characterized as a movement towards the enjoyment by the individual of collective rights, and that trend also deserved further consideration by the Special Rapporteur.

31. Mr. KAMTO said that the three-phase temporal approach was perhaps instructional, but there were two reasons why it was unsuitable for addressing the subject in a rational manner. First, as Mr. Forteau had rightly noted, there were many rules that were applicable during all three phases, and second, the temporal approach would cause the Commission to stray outside the scope of the topic in some areas of its work. If, as indicated by the Special Rapporteur, phase I addressed obligations that were applicable in peacetime, then that phase clearly fell outside the scope of the topic. Accordingly, the Commission should underscore the fact that phase I was relevant only insofar as it was closely linked to the core of the topic, which was presented in the preliminary report as phase II, and on which the Commission should focus its efforts.

32. By the same token, phase III, which concerned post-conflict measures, was pertinent to the topic only to the extent that it addressed the consequences of the harm caused to the environment during an armed conflict. For that matter, the definition of armed conflict reproduced in paragraphs 69 and 70 of the preliminary report showed that it was pointless to draw a distinction between the three phases, since it was difficult to ascertain where the first phase ended and the second began. A more effective approach would be to focus on identifying the principles and rules that applied to the protection of the environment in relation to armed conflicts, rather than on the particular point in time during which a given rule should be applied.

33. There were two substantive points he wished to raise. The first concerned the use of terms. With regard to "armed conflict", he concurred with the Special Rapporteur's proposal in paragraph 70 of her preliminary report

[264] *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. I, para. 1.

to reproduce, in its entirety, the definition employed by the International Tribunal for the Former Yugoslavia in the *Prosecutor* v. *Duško Tadić a/k/a "Dule"* decision. It differed from the one used in the articles on the effects of armed conflicts on treaties[265] in that, at the end of the sentence, it contained the phrase "or between such groups within a State". With regard to the present topic, the obligation to protect the environment, even in the event of an armed conflict, was not derived exclusively from international treaties and was generally imposed on other actors besides States. Non-international armed conflicts were not solely those that pitted armed groups against the State; they could also be those that pitted armed groups against each other. Such groups were also required to apply the rules concerning the protection of the environment in relation to an armed conflict. As to the use of the term "environment", he concurred with the definition proposed by the Special Rapporteur in paragraph 79 of her preliminary report, since it contained all the generally accepted components and had been drawn from the Commission's previous and relatively recent work.

34. The second substantive point concerned issues that either should or should not be included in the scope of the present topic. The Special Rapporteur had proposed to exclude the following: situations where environmental pressure, including the exploitation of natural resources, caused or contributed to the outbreak of armed conflict; the protection of cultural property; the effect of particular weapons on the environment; and refugee law. In his own view, the following issues should also be excluded: human rights in relation to the protection of the environment; the rights of indigenous peoples; and sustainable development.

35. On the other hand, the Commission could not, in its work on the present topic, allow itself not to address the question of methods and means of warfare. Although he concurred with Commission members who were in favour of excluding the issue of weapons from the topic, the Commission could not do less than the International Court of Justice in that regard. After analysing certain provisions of the law of armed conflicts in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court had recalled the prohibition of the use of methods or means of warfare that were intended, or might be expected, to cause widespread, long-term and severe damage, indicating that this rule was applicable in the context of the protection of the environment in relation to armed conflicts (para. 31 of the advisory opinion).

36. In addition, the Commission might wish to consider addressing the criminalization of acts committed in relation to armed conflicts that significantly harmed the environment, in particular when such acts caused deliberate, severe or irreversible damage. Specifically, it should analyse whether those offences could be considered war crimes. The question had been discussed at length during the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.

37. Given that the Commission was at the preliminary stage of its consideration of the topic, he wished to propose three questions that might help to restructure or guide its analysis. The first was: Which principles and rules of general international law and international environmental law, if any, were applicable to the protection of the environment in relation to armed conflicts? He had in mind, for example, the principle of the permanent sovereignty of the State over its natural resources, which had not arisen as a principle of international environmental law but which could be applied, particularly during wartime occupation, when the occupying Power exploited the natural resources of the occupied State. The second question was: Which rules of the law of armed conflict were applicable or adaptable to the protection of the environment in relation to armed conflicts? The third question was: What were the legal consequences of serious damage to the environment caused in relation to armed conflicts?

38. With regard to the non-exhaustive list of principles and rules on which the Commission might base its future work on the topic, he suggested the inclusion of the principles of necessity, proportionality, due diligence, permanent sovereignty of the State over its natural resources, and cooperation with a view to the reparation of ecological damage caused in relation to an armed conflict. He also proposed including the following rules or obligations: the obligation to take ecological considerations into account in implementing the principles and rules of law applicable to armed conflicts; the obligation to protect the natural environment against widespread, long-term and severe damage in relation to armed conflicts; the prohibition of the employment of methods or means of warfare that were intended or might be expected to cause widespread, long-term and irreversible damage to the environment; and the obligation to make reparation for widespread, long-term, severe or irreversible damage to the environment in relation to armed conflicts.

39. Mr. VÁZQUEZ-BERMÚDEZ said that he agreed with the Special Rapporteur's proposal to approach the topic in three phases, but that such an approach did not preclude the application of specific rules or principles in more than one of the phases. In order to ensure the protection of the environment, it was necessary to identify and systematize the set of rules and principles of international law that would be applicable throughout the three phases. The application of the law of armed conflict in that regard did not, of course, exclude the application of other rules of international law.

40. There was a growing awareness and conviction within the international community concerning the need to ensure the legal protection of the environment in general, and in relation to armed conflicts, in particular. General Assembly resolution 56/4 of 5 November 2001 stated that damage to the environment in times of armed conflict impaired ecosystems and natural resources long beyond the period of conflict, and often extended beyond the limits of national territories and the present generation. In order to raise awareness of that situation, the resolution proclaimed 6 November as the International Day for Preventing the Exploitation of the Environment in War and Armed Conflict.

[265] General Assembly 66/99 of 9 December 2011, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2011*, vol. II (Part Two), pp. 107 *et seq.*, paras. 100–101.

41. In light of the foregoing, it was best not to jump to the conclusion that the Commission had no intention of modifying the law of armed conflict, as was stated in paragraph 62 of the preliminary report. It was inevitable that the Commission would analyse the rules in the law of armed conflict in relation to the protection of the environment and clarify their content and scope and their parallel application with other rules of international law. It would adapt those rules to the current reality of the international community—including, but not limited to, the increased number of non-international armed conflicts—and to the technological developments that had fostered the proliferation of weapons of mass destruction, the use of which could have catastrophic consequences for the environment. In that connection, he shared the view expressed by Mr. Kamto about including within the scope of the topic the methods and means of warfare.

42. There had been important developments with regard to the protection of the environment in the national laws of certain South American countries where the ancestral world view of the indigenous peoples encompassed not only respect for Mother Nature—or "Pacha Mama" in the Quechua language—but also living in harmony with nature (art. 71). The Constitution of Ecuador went so far as to recognize nature as a subject of rights. Recognition of the rights of nature was also included as a cross-cutting theme in other constitutional provisions, such as those relating to a nation's overall development.

43. In the first sentence of paragraph 106 of her preliminary report, the Special Rapporteur referred to the "presumption" that the existence of an armed conflict did not *ipso facto* terminate or suspend the operation of treaties, as provided for in the articles on the effects of armed conflicts on treaties (art. 3). He agreed with Sir Michael that the reference was not to a presumption; rather it was to a general principle, as evidenced by the fact that the title of article 3 was "General principle". Some items on the indicative list of categories of treaties whose subject matter implied that they continued in operation during armed conflict, included in the annex to the articles on the effects of armed conflicts on treaties, were illustrative for the purposes of the current topic. Also relevant were article 10 (Obligations imposed by international law independently of a treaty) and aspects relating to the law of armed conflict to be found in article 14 (Effect of the exercise of the right to self-defence on a treaty) and article 15 (Prohibition of benefit to an aggressor State).

44. The definition of "armed conflict" proposed by the Special Rapporteur was appropriate, and he agreed with adding the phrase "or between such groups within a State" at the end. The definition of "environment" should be broad enough to refer not only to transboundary harm but also to the environment in general. The Commission's previous definition[266] provided a good starting point and would enable the protection of the natural heritage to be included in the scope of the topic. That would align the Commission's approach with the Convention for the protection of the world cultural and natural heritage which, with 191 States parties, had achieved near universal ratification. Among the serious threats that could have permanent effects on cultural and natural heritage sites, the Convention listed the outbreak or the threat of an armed conflict. He agreed that the scope of the present topic should not include cultural property, however.

45. The Special Rapporteur had done a good job in identifying the various concepts and principles relevant to the topic. The special relationship that indigenous peoples had with the environment was particularly susceptible to the effects of armed conflict and justified the need for granting them special legal status, as rightly noted by the Special Rapporteur in paragraph 165 of her preliminary report. In that regard, he drew attention to paragraph 147 of the judgment of 25 May 2010 handed down by the Inter-American Court of Human Rights in the well-known *Case of Chitay Nech* at al. v. *Guatemala*, in which the Court had considered that the forced displacement of indigenous peoples from their communities could place them in a special situation of vulnerability and create a clear risk of extinction, and that it was therefore indispensable for States to adopt specific measures of protection to prevent and reverse the effects of such situations.

The meeting rose at 1.05 p.m.

3231st MEETING

Friday, 25 July 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Protection of the environment in relation to armed conflicts (*concluded*) (A/CN.4/666, Part II, sect. F, A/CN.4/674)

[Agenda item 10]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the Special Rapporteur to summarize the debate on her preliminary report on the protection of the environment in relation to armed conflicts (A/CN.4/674).

2. Ms. JACOBSSON (Special Rapporteur) said that she would address only some of the specific issues raised during the debate, but that all the comments made by the members of the Commission would be duly reflected in her second report. The objective of the preliminary report had been to seek the views of colleagues on the matters

[266] *Yearbook … 2006*, vol. II (Part Two), p. 58, para. 66, principle 2 (*b*).

to be dealt with as part of future work on the topic; that approach should not be interpreted as surrender or indecision on her part. Many members of the Commission had offered their views on the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), and the principles of proportionality and military necessity, which belonged purely to the sphere of *jus in bello* and thus fell outside the scope of the preliminary report. She would return to those aspects in her next report, as well as to post-conflict issues such as peacekeeping operations, reparation and responsibility.

3. Although the majority of members had welcomed the adoption of a three-phase approach, several had expressed a preference for a thematic approach. That solution, adopted in the relevant 2009 United Nations Environment Programme report,[267] had proven unsuitable, however, as instead of allowing a holistic approach to the subject, it separated the various branches of law: the methodology thus made the elaboration of guidelines or operational recommendations difficult. Although many members had also been of the view that greater emphasis should have been placed on phase II in the preliminary report, she wished to make it clear that she had no intention of neglecting that phase in her second report. On the other hand, she disputed the argument that the 2011 syllabus for the topic supported the proposition that phase II was at the heart of the legal issues. The Commission's composition had changed since 2011 and it was the opinion of the current members that should guide its work on the topic. Nonetheless, it was probably necessary to clarify what was understood by phase II. The starting point for an analysis of that phase was the law of armed conflict, as set out in treaties such as the 1949 Geneva Conventions for the protection of war victims and their additional protocols. There was no doubt that this was an important body of law for the purpose of protecting the environment: the Commission could obviously not modify the provisions of such treaties. At the same time, other rules of international law were applicable *before* or *after* an armed conflict, applying either exclusively to those phases or also to the protection of the environment *during* armed conflict (phase II). It was that body of law that needed to be identified, and she intended to do so in her second report, which would take account of the provisions of international humanitarian law on measures that needed to be addressed before an armed conflict commenced, such as article 36 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I).

4. With regard to the scope of the topic, she recalled that her intention was not to exclude weapons, but that the issue should not be the focus of the Commission's work. As had been proposed, the solution might be to include a "without prejudice" clause. The exclusion of cultural heritage had been supported by most members who had spoken on the issue. The relationship between the environment and cultural heritage was complex, particularly with regard to aesthetic and characteristic aspects of the landscape and indigenous peoples' rights to their environment as a cultural and natural resource. The Commission should perhaps also consider the distinction between the protection of cultural property and of cultural heritage in relation to armed conflict. A gap arose there because of a divergence in the definition of "cultural property" in the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict and the definition of "cultural heritage" in the 1972 Convention for the protection of the world cultural and natural heritage, which was broader, covering also the works of man or the combined works of nature and man, such as aesthetic aspects of landscapes. She would again consult experts at UNESCO and go into more detail on the various issues in her second report, taking into account the possible impact of certain aspects of law on the definition of the terms "environment" and "natural environment", as well as humanitarian law terms such as "civilian object" and "military objectives", so that the Commission could take a decision on whether cultural heritage should be included in the definition of environment or addressed in another way. The issue of refugees and displaced persons remained within the scope of the topic, but would be addressed with caution, as had been proposed in the preliminary report. Lastly, there seemed to be a general understanding that there was no urgent need to address the question of the use of terms.

5. With regard to sources and the practice of States, she noted that the legislation and regulations mentioned in the preliminary report were those that contained "provisions *in relation to* an armed conflict" and not "provisions *applicable* during an armed conflict": hence, there was no assumption that such provisions had replaced what was needed and required with regard to a situation of armed conflict. It would be valuable if the Commission could repeat its request to States for information, but reformulate it to ensure that examples were provided of cases in which the rules of international environmental law, including regional and bilateral treaties, had continued to be applied during an armed conflict. The Commission's ongoing work on other topics, especially the protection of persons in the event of disasters, had been and would continue to be taken into consideration in her work on the topic at hand.

6. Chapters X and XI of the preliminary report had generated two categories of comments. Some members had been of the view that the manner in which environmental principles and concepts functioned in the context of armed conflict and the relationship between the two areas had not been explained with sufficient clarity. That view was justified, as it had not been her intention to establish that relationship, but rather to seek the views of the members of the Commission on the relevance of the principles and concepts as such in order to formulate guidelines, recommendations or conclusions. Other members had considered that the issue of sustainable development was of little relevance to the topic; although she shared that opinion in principle, she noted that there had long been a political connection between war and sustainable development, outlined in Principle 24 of the Rio Declaration on Environment and Development.[268]

[267] United Nations Environment Programme, *Protecting the Environment During Armed Conflict: an Inventory and Analysis of International Law*, Nairobi, 2009.

[268] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution I, annex I.

7. With regard to the "polluter pays" principle, she had not intended to suggest that it had been first formally identified in the *Trail Smelter* and *Chorzów Factory* cases, but rather that addressing issues associated with the regulation of pollution had been a consistent endeavour in international law and, more specifically, that international regulatory trends emphasizing the prohibition of pollution and State responsibility upon proof of damage had been evidenced in both of those cases and had contributed greatly to the formal recognition of the "polluter pays" principle. With respect to the procedural aspects of human rights, that topic was being addressed by the Independent Expert on human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Mr. Knox, who had written a report on the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

8. With regard to the outcome of the work on the topic, members of the Commission had drawn attention to two main issues, namely the scope of protection and the target audience. The response to the second question was likely to differ depending on the phase, and would involve first defining the audience: the States that were the recipients of the outcome or the natural and legal subjects that were supposed to apply the rules or recommendations on the ground. She would return to that question in her second report, which would include proposals for guidelines, conclusions or recommendations on, *inter alia*, general principles, preventive measures, cooperation and examples of rules of international law that were candidates for continued application during armed conflict and protection of the marine environment. The third report would contain proposals concerning post-conflict measures, including cooperation, sharing of information and best practice and reparation measures.

Provisional application of treaties[269] (A/CN.4/666, Part II, sect. E, A/CN.4/675[270])

[Agenda item 8]

Second report of the Special Rapporteur

9. The CHAIRPERSON invited the Special Rapporteur on the provisional application of treaties to introduce his second report (A/CN.4/675).

10. Mr. GÓMEZ ROBLEDO (Special Rapporteur) reviewed the history of the Commission's work on the topic and gave an outline of the report, noting that the main objective had been to consider the legal consequences of the provisional application of treaties in greater depth. Although in practice there was indisputably a link between the provisional application of treaties and domestic law, especially constitutional law, it was not necessary for the Commission to do a comparative analysis. Chapter I of the report presented an analysis of the views expressed by States on the topic in the Sixth Committee. The majority had shown a clear interest in the topic, particularly the issue of the legal consequences of provisional application. He had duly taken into consideration their views, although further information on State practice would need to be collected before any conclusions could be drawn in that regard. Chapter II of the report dealt with the legal effects of the provisional application of treaties, which was the most important aspect of the work. This chapter addressed the issues of the source and nature of obligations arising from provisional application, which were the rights that arose from provisional application and on whom they were enforceable, what types of obligations arose from provisional application and on whom they were imposed, and the termination of obligations. Any study that overlooked the legal consequences of provisional application for other States or third parties concerned would be of little interest in terms of the progressive development of international law or practice. The study at hand demonstrated that provisional application did indeed give rise to legal consequences, both at the national and international level. Cases concerning the scope of legal consequences of the breach of a treaty applied provisionally had been brought before international courts. The third chapter of the report was an examination of the legal consequences of the breach of a treaty applied provisionally. In that respect, it was noted that the regime of responsibility of States for internationally wrongful acts also applied in the case of breach of an obligation arising from provisional application. In the last chapter of the report, he stated his intention of collecting further information on State practice so as to present a more comprehensive analysis of the subject. He would also deal with the issue of provisional application of treaties by international organizations and would start to prepare draft guidelines or conclusions.

11. The CHAIRPERSON invited the members of the Commission to examine the Special Rapporteur's second report on the provisional application of treaties (A/CN.4/675).

12. Mr. MURASE noted that the Special Rapporteur had rightly referred to international arbitral awards, and in particular to the *Yukos* case (*Yukos Universal Limited (Isle of Man)* v. *the Russian Federation*), which offered a good deal of insight into the issues discussed in the second report and highlighted both the usefulness and dangers associated with the provisional application of treaties. However, he had a number of comments to make in relation to the Special Rapporteur's analysis of the decision of the Permanent Court of Arbitration. First, one of the main issues involved in that case was whether the provisional application of the Energy Charter Treaty, provided for in article 45, paragraph 1, of that instrument, was consistent with the Constitution and legislation of the Russian Federation. Given that a

[269] At its sixty-third session (2011), the Commission decided to include the topic in its long-term programme of work (*Yearbook … 2011*, vol. II (Part Two), p. 175, para. 365, and *ibid*., annex III, pp. 198 *et seq.*). At its sixty-fourth session (2012), the Commission decided to include the topic in its programme of work and to appoint Mr. Juan Manuel Gómez Robledo Special Rapporteur on the topic (*Yearbook … 2012*, vol. II (Part Two), p. 67, para. 141). At its sixty-fifth session (2013), the Commission examined the first report of the Special Rapporteur (*Yearbook … 2013*, vol. II (Part One), document A/CN.4/664) and a Secretariat memorandum on the work previously carried out by the Commission on the topic (*ibid*., document A/CN.4/658).

[270] Reproduced in *Yearbook … 2014*, vol. II (Part One).

number of treaties contained similar provisional application clauses, a comparative analysis of the domestic law of a range of States was indispensable—contrary to the Special Rapporteur's view. In paragraph 32 of the report, the Special Rapporteur indicated that the intention to apply a treaty provisionally could be "communicated either expressly or tacitly". At the time of signing the Energy Charter Treaty, the Russian Federation had not made the declaration, provided for in article 45, paragraph 2, that it did not accept provisional application as set out in paragraph 1 of the same article. The Permanent Court of Arbitration had found that an express declaration was not required and that the clause could be considered to be directly applicable; however, having examined the relationship between the two paragraphs in light of the 1969 Vienna Convention, it had reached the conclusion that the provisional application of the Treaty was not inconsistent with the Constitution and domestic law of the Russian Federation. Another issue raised in that case was whether the obligation of provisional application extended to the whole treaty or only to selected provisions. The Court had rejected the theory of partial application put forward by the Russian Federation, arguing that a piecemeal approach under which it would be decided whether to provisionally apply each individual provision of a treaty depending on whether it was consistent with domestic law, within the meaning of article 45, paragraph 1, would come into conflict with the principle of *pacta sunt servanda*. It was important that the Commission consider the question carefully. The Special Rapporteur had rightly recalled, in paragraph 83 of the report, that the termination of the provisional application of a treaty did not necessarily entail the termination of obligations created by such provisional application, as also illustrated in the *Yukos* case. Indeed, while the Russian Federation had terminated the provisional application of the Energy Charter Treaty on 19 October 2009 in accordance with article 45, paragraph 3 (*a*), the property of investors would remain protected until 19 October 2029 under paragraph 3 (*b*) of the same article. Again, the Commission should discuss the issue in greater detail.

13. The Special Rapporteur seemed to be treating a unilateral declaration of acceptance of treaty obligations and provisional application of a treaty on the same level, although the two should be differentiated. The concepts of "enforceability" and "opposability" should also be clarified, as the latter could be employed not only *vis-à-vis* third States, but also *vis-à-vis* the other parties to the treaty. The Commission should not wait for States to have responded to the request for information on their practice before starting on its substantive discussions on the topic, as experience had shown that few States tended to respond to such requests.

14. Mr. KITTICHAISAREE said that he agreed with that remark: the Commission might well have to rely on other sources, especially doctrine, to avoid delaying work on the topic. In addition, he noted that often special rapporteurs had to prepare reports without having received comments and observations from States; this was the case, in particular, for the Commission's reports on the obligation to extradite or prosecute (*aut dedere aut judicare*).

Immunity of State officials from foreign criminal jurisdiction (*concluded*)* (A/CN.4/666, Part II, sect. B, A/CN.4/673, A/CN.4/L.850)

[Agenda item 5]

Report of the Drafting Committee

15. Mr. SABOIA (Chairperson of the Drafting Committee) introduced the texts and titles of draft articles 2 (*e*) and 5, provisionally adopted by the Drafting Committee, as contained in document A/CN.4/L.850.

16. Draft article 2 (*e*) read:

Definitions

For the purposes of the present draft articles:

…

(*e*) 'State official' means any individual who represents the State or who exercises State functions.

17. Draft article 2 (*e*), as provisionally adopted by the Drafting Committee, was a more concise version of the draft text proposed by the Special Rapporteur in the annex to her third report (A/CN.4/673), which covered representation of the State and the exercise of elements of governmental authority. Some members considered that it was unnecessary to define "State official", given that it was not defined in international law, but the Drafting Committee, taking into consideration the comments made in plenary, had considered that it was advisable and feasible to do so. It had also elected not to refer to the Head of State, the Head of Government and the Minister for Foreign Affairs, as it went without saying that they represented the State. That also averted confusion and ensured greater coherence within the draft articles as a whole, particularly with regard to the relationship between immunity *ratione materiae* and immunity *ratione personae*. The new definition was sufficiently broad to cover the members of the troika and individuals who, in various capacities, exercised a range of public functions on behalf of the State.

18. Bearing in mind the comments made during the plenary debate, particularly the reservations expressed by certain members in relation to the use of the term "organ" as proposed by the Special Rapporteur in her third report, the Drafting Committee had decided to retain the terms "official" in English, *représentant* in French and *funcionario* in Spanish. The new definition covered only individuals and not legal persons; the Drafting Committee had opted for the word "individuals" rather than "persons", which could be used to describe the two, in order to underscore that aspect.

19. Although "State functions" was not a legal term, it had the advantage of being more specific than the term "functions", which had been proposed during the debate in the Drafting Committee. Although international law did not, generally speaking, govern the structure and functions of the State, which were the responsibility of each State, it came into play in the case of activities that were essentially public functions or were linked to the exercise

* Resumed from the 3222nd meeting.

of elements of governmental authority. The concept of "State functions" should thus be understood in the broad sense; what was covered by the concept would depend on the specific circumstances of each case, which would have a bearing on the procedural aspects of immunity. It would be noted in the commentary that some members had not been entirely satistifed with that term. With regard to the use of the present tense in the definition of "State official", it was understood that it was without prejudice to the application of immunity *ratione materiae* to former State officials. Some members had been of the view that it was not necessary to define "State official", as the most important aspect in relation to immunity *ratione materiae* was the nature of the acts and not the person who had carried them out; that view would be reflected in the commentary.

20. Draft article 5, entitled "Persons enjoying immunity *ratione materiae*", tracked the language of draft article 3 on persons enjoying immunity *ratione personae*, and read:

Draft article 5. Persons enjoying immunity ratione materiae

State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.

21. That draft article was at the beginning of Part Three, on immunity *ratione materiae*, which the Special Rapporteur would expand in her next report. As doubts had been raised about the expression "who exercise governmental authority", which had been taken from the articles on responsibility of States for internationally wrongful acts,[271] it had been deleted. However, although the draft article dealt only with subjective scope, there was a need to show a link between the State and the person that justified the person's capacity to exercise governmental authority, even though the nature of that link would be specified later in the context of the material scope. The Special Rapporteur had proposed referring to State officials "acting as such" or "acting in an official capacity". The former option had been selected, as it referred to individuals who represented the State or exercised State functions, without referring to the material scope of immunity *ratione materiae*. When immunity *ratione materiae* was addressed, the expression "acting as such" could be reviewed. At that point, it would also be necessary to consider the question of the immunity *ratione materiae* of the members of the troika, since draft article 4, provisionally adopted at the previous session, provided that the cessation of immunity *ratione personae* was without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.

22. The CHAIRPERSON invited the Commission to adopt document A/CN.4/L.850, containing draft articles 2 (*e*) and 5 on the immunity of State officials from foreign criminal jurisdiction, as provisionally adopted by the Drafting Committee.

Draft article 2 (*e*). Definitions

*Draft article 2 (*e*) was adopted.*

Draft article 5. Persons enjoying immunity *ratione materiae*

Draft article 5 was adopted.

The Drafting Committee's report as a whole, as contained in document A/CN.4/L.850, was adopted.

The most-favoured-nation clause

[Agenda item 7]

Oral report of the Study Group

23. Mr. FORTEAU (Acting Chairperson of the Study Group on the most-favoured-nation clause) said that, in the absence of Mr. McRae, he had served as Chairperson of the Study Group, which had been reconstituted during the current session. The Study Group had met three times, on 9, 10 and 18 July 2014. It had considered a draft report prepared by its Chairperson that was divided into three parts. Part I recalled the origins of the work, the contemporary relevance of most-favoured-nation clauses and the questions raised by such clauses, Part II gave an overview of the interpretation by the courts of most-favoured-nation clauses contained in investment treaties, and Part III analysed in greater detail the various elements related to such interpretation. The final draft report was based on the working papers and other informal documents that had been discussed since 2009. The Study Group's objective had been to prepare a new draft final report on that basis for consideration and adoption the following year.

24. The Study Group had decided to systematically analyse the various issues considered since work had begun on the topic, considering the most-favoured-nation clause within the broader framework of general international law, and taking account of developments since the adoption of the 1978 draft articles.[272] It had once again stressed the importance and relevance of the 1969 Vienna Convention in the interpretation of investment treaties and the need to take account of the Commission's previous work on the fragmentation of international law[273] and on subsequent agreements and subsequent practice in relation to the interpretation of treaties.[274] It had recalled that the final document should be of practical utility to those involved in the field of investment and to policymakers. The Study Group believed that it would be in a position to submit a revised draft final report at the Commission's sixty-seventh session in 2015.

25. The CHAIRPERSON said that he took it that the Commission wished to take note of the oral report of the Study Group on the most-favoured-nation clause.

It was so decided.

The meeting rose at 12.45 p.m.

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[271] General Assembly resolution 56/83 of 12 December 2001, annex. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

[272] *Yearbook … 1978*, vol. II (Part Two), chap. II, sects. C and D, pp. 16 *et seq.*

[273] See *Yearbook … 2006*, vol. II (Part Two), chap. XII, pp. 175 *et seq.*

[274] See *Yearbook … 2013*, vol. II (Part Two), chap. IV, pp. 16 *et seq.*

3232nd MEETING

Wednesday, 30 July 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Provisional application of treaties (*continued*) (A/CN.4/666, Part II, sect. E, A/CN.4/675)

[Agenda item 8]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the second report on the provisional application of treaties (A/CN.4/675).

2. Mr. EL-MURTADI SULEIMAN GOUIDER emphasized the importance of the provisional application of treaties as a practical way of ensuring legal security. States had accorded considerable importance to the effects of provisional application in discussions within the Sixth Committee; it had been generally accepted that consenting to application obliged a State to abide by the rights and obligations contained in a treaty as if it had come into force. However, some difficulties in the application of treaties remained to be overcome. The *travaux préparatoires* for the 1969 Vienna Convention provided little insight into article 25 thereof or its intended application. The provisional application of treaties varied from one State to another and could only be in conformity with each State's own legislation; however, a comparative study of domestic law would be too time-consuming and have no practical advantage for States. In its judgment in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, the International Court of Justice had ruled that provisions of the Constitution of Bahrain had been violated by State practice.

3. He endorsed the Special Rapporteur's intended focus on the legal effects that the provisional application of treaties had at international level. It was important to understand the practice of different States. The Commission had hoped to receive more responses to its enquiries in that regard, and more information would be required before the Special Rapporteur could reach conclusions on the subject.

4. It was possible that the nature of the issue and discrepancies in the principles that States followed accounted for the lack of coherent practice. In Libya, as in other countries, the simple fact of signing and ratifying a treaty was often sufficient for it to apply provisionally, without a need for specific provisions to that effect.

5. Other factors affecting the issue of provisional application included customary international law for States that were not party to the 1969 Vienna Convention, the relationship between article 25 and other articles of that Convention, and the differences between bilateral and multilateral treaties.

6. Mr. FORTEAU said that the deductive approach taken by the Special Rapporteur in his second report had some advantages, but also gave rise to certain doubts concerning the nature of the conclusions drawn that required further clarification. Indeed, it was not clear whether the conclusion contained in the second report were hypotheses, presumptions, preliminary conclusions or final conclusions. Moreover, they needed to be substantiated by relevant practice. Future reports should pursue a more inductive approach. That was true in at least four respects.

7. First, in his view, article 25 of the 1969 Vienna Convention did not allow for a treaty to be applied provisionally on the basis of a unilateral declaration by a State. The State might consider itself bound, and could be bound as a matter of international law, but such a unilateral commitment did not fall within the provisional application of treaties. However, article 25 did require an agreement between negotiating States. Second, he expressed doubt concerning the conclusion, drawn in paragraph 82 of the second report, and based on the guiding principles applicable to unilateral declarations of States capable of creating legal obligations adopted by the Commission in 2006,[275] that provisional application could not be revoked arbitrarily: on the contrary, the letter of article 25 of the 1969 Vienna Convention accorded States the unconditional right to end provisional application. The guiding principles did not therefore seem to apply in the specific context of the provisional application of treaties. Third, paragraphs 60 to 64 of the second report, concerning the opposability *ratione personae* of treaties applied provisionally, were somewhat confusing.

8. Fourth, he refuted the Special Rapporteur's assertion that article 70 of the 1969 Vienna Convention would apply as such to the cessation of the provisional application of a treaty, and that therefore performance obligations under provisional application would produce legal effects after a treaty ceased to be applied provisionally. While there were certainly some points of convergence between the law of treaties in force and the law of treaties applied provisionally, they were not identical. The law of treaties in force might apply to the provisional application of treaties *mutatis mutandis*, but that needed to be confirmed by assessing the relevant practice. The very essence of the topic was to identify whether and to what extent it resulted from State practice that the regime of treaties in force (including article 70 of the 1969 Vienna Convention) applied to treaties applied provisionally.

9. Analysing relevant State practice was crucial to the topic and should be a particular focus of the Special Rapporteur's work. That included close scrutiny of domestic

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[275] *Yearbook … 2006*, vol. II (Part Two), pp. 161 *et seq.*, para. 176.

practice: despite the fact that States could not invoke domestic law to circumvent international commitments, much could be learned from examining the status of provisional application in domestic legislation. Domestic case law should likewise be taken into consideration for the evidence of State practice and *opinio juris* that it could reveal; the practice of depositary States and international State practice should also be examined closely. Only a detailed study of relevant practice would enable the Commission to identify the regime for the provisional application of treaties. Rather than waiting for States to provide information on their practice, the Special Rapporteur should seek it out.

10. Furthermore, contrary to what was stated in paragraphs 91 to 95 of the second report, it could not be said that the existing regime concerning the responsibility of States for internationally wrongful acts applied wholesale to the provisional application of treaties. Article 13 of the articles on responsibility of States for internationally wrongful acts[276] explicitly referred to international obligations "in force" at the time that an act occurred, but a treaty being applied provisionally was not formally in force. Nor could common law apply automatically: modifications would be needed and the treaty must be interpreted such as to ensure that its provisional application was meaningful. Such questions should be explored in detail.

11. Finally, it must be stressed that during the Commission's discussions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, reservations had been expressed over the fact that, in the draft conclusions adopted (see draft conclusion 9[277]), the concept of "agreement" was used in a broader sense than in the 1969 Vienna Convention, rather than in the strict legal sense of an agreement that created rights and obligations or was legally opposable to its parties. In line with a recent award made by the Permanent Court of Arbitration in the *Matter of the Bay of Bengal maritime boundary arbitration between the People's Republic of Bangladesh and the Republic of India*, only "authentic agreements" were considered "agreements" in the sense of article 31 of the 1969 Vienna Convention (para. 165 of the award). In paragraph 35 of his second report, the Special Rapporteur referred to negotiating States that "agree" to apply a treaty provisionally, in accordance with the Convention, but the exact meaning of the term "agree" in that context must be determined. As a fundamental issue relating to the regime applicable to agreements that were not treaties, the matter should be considered in depth.

12. Ms. ESCOBAR HERNÁNDEZ, noting that the legal consequences of the provisional application of treaties were probably of most interest to States, endorsed the approach taken by the Special Rapporteur to break the topic down into four main areas: the source of obligations; rights and obligations created by provisional application; and the termination of obligations. It would be useful to make that structure even more explicit in any conclusions or recommendations that might be drafted.

13. The provisional application of treaties, provided for in the 1969 Vienna Convention and regulated by international law, established a link between States; that link had legal effects. The aim of provisional application was not to replace the entry into force of a treaty, but to anticipate it. As such, the effects of provisional application could not be considered distinct from the effects of the treaty once in force, nor analysed differently. Provisional application could not substantively alter the content of a treaty. It could not be used by those who had not taken part in its negotiation, nor could it give rise to a legal regime separate from that provided for in the treaty itself. It simply meant that all or some of a treaty's provisions would apply sooner, but their effects remained the same, both domestically and internationally. She doubted whether the domestic and international obligations arising from the provisional application of a treaty could be separated, as the Special Rapporteur suggested in his second report. Although drawing a distinction between them might shed light on States' motivation for applying a treaty provisionally, it was irrelevant to analysing the obligations themselves.

14. The identification of four types of situations in which a treaty might be applied provisionally was undeniably useful in explaining how provisional application might come about, but less so in identifying its effects, which would not depend on the form in which States expressed their will to apply a treaty provisionally. She questioned some of the statements made in the second report concerning the nature of that will: paragraphs 35 (*d*), 36, 38 and 54, in particular, reflected a tendency to regard provisional application as the result of a State's unilateral declaration. Although the second report seemed to restrict such effects to situations in which a treaty contained no obligation concerning its provisional application, she did not share that conclusion. Rather, provisional application should be seen as a specific aspect of the law of treaties based on the consent or agreement of States or international organizations, which could be deduced from article 25 of the 1969 Vienna Convention. The two options provided in that article—a specific treaty provision or another form of agreement between negotiating States—both relied on consent between parties; neither could therefore be viewed as a unilateral act *stricto sensu*. Even an individual declaration by a State indicating that it would (or would not) apply a treaty not yet in force would be based on the relevant agreed provision of the treaty in question. The examples used in the second report to support the view that provisional application could be a unilateral act were not convincing.

15. Practice suggested that provisional application of a treaty need be neither uniform nor universal. The Special Rapporteur seemed to accept the possibility of a "multilayer" model, as did she; however, the matter should be considered in terms of both the distinction between bilateral and multilateral treaties and the different legal effects that might arise between States that accepted—implicitly or explicitly—or rejected the provisional application of a particular treaty.

[276] General Assembly resolution 56/83 of 12 December 2001, annex. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

[277] See the 3215th meeting above, p. 76, paras. 8–11.

16. With regard to international responsibility, she agreed that violation of a treaty being applied provisionally gave rise to international responsibility in the same or a similar manner as for a treaty in force; however, as the issue was of significant importance, it would be useful for the Special Rapporteur to consider it in more detail in a future report.

17. While she agreed that, in studying aspects of international law, the Commission should focus on the international legal system, and that it was not the Commission's task to undertake a comparative study of domestic law relevant to the topic, a descriptive analysis of various national practices could prove interesting and add value to the Commission's work, enabling it to give States specific examples of how provisional application operated in practice. Moreover, domestic law formed part of State practice. To that end, it might be necessary to ask States again to provide the Commission with relevant information.

18. Mr. PARK said that he concurred with the Special Rapporteur's proposal to base the Commission's consideration of the topic on two premises: that the legal effects of the provisional application of a treaty were not the same as the treaty's entry into force, and that, despite its temporary nature, the provisional application of a treaty produced legal effects. Those premises were well illustrated by the decision on jurisdiction of an arbitral tribunal of the International Centre for Settlement of Investment Disputes in the proceedings between *Ioannis Kardassopoulos* v. *Georgia*.

19. If it was accepted that provisional application produced legal effects, then the question arose as to which of the provisions of the 1969 Vienna Convention that applied following the entry into force of a treaty were applicable, *mutatis mutandis*, to its provisional application. Articles 45, 54, 60 and 70 of the Convention seemed to apply to provisional application only to the extent that doing so was acceptable or reasonable.

20. When considering the possible legal effects of provisional application, the Commission had to reconcile the objective of enhancing the legitimacy and legal certainty of provisional application with that of responding appropriately to potential concerns of States that there might be a lesser incentive to ratify a treaty when it was recognized that provisional application produced legal effects.

21. Although the Special Rapporteur indicated in paragraph 18 of his second report that he did not intend to carry out a comparative study of domestic law requirements for the provisional application of treaties, it was worth noting that, in practice, the provisional application of treaties was always in conformity with domestic law—in particular constitutional law. It was therefore important for the Commission to study the provisions of the 1969 Vienna Convention that related to domestic law, such as article 46, and it should devote at least one clause in a future guideline to the relationship between domestic law and the provisional application of treaties.

22. The provisional application of a treaty resulted from an agreement between negotiating States if provided for in the treaty itself, by means of a separate agreement or if the negotiating States "in some other manner so agreed". That formulation presented negotiating States with a broad range of options, which could include an implicit agreement or a unilateral declaration by a State. It was necessary to consider carefully whether the mere fact of making a unilateral declaration could, of itself, result in a provisional application, since, on the one hand, article 25 of the 1969 Vienna Convention did not expressly refer to unilateral declarations, and on the other, such authorization risked compromising the legal certainty of the law of treaties.

23. In his view, a unilateral declaration to apply a treaty provisionally produced its effects only in the case where the negotiating parties had explicitly provided for that mechanism in the text of the treaty. The obligations arising from provisional application were thus derived, not from the unilateral declaration itself but from the agreement between the States concerned. That view was reflected in the opinion of Mr. W. Michael Reisman of 28 June 2006[278] before a tribunal of the Permanent Court of Arbitration concerning arbitral jurisdiction under the Energy Charter Treaty with respect to the Russian Federation in *Yukos Universal Limited (Isle of Man)* v. *the Russian Federation*, of which he read out an excerpt, and was consistent with article 27 of the 1969 Vienna Convention.

24. Article 25, paragraph 2, of the 1969 Vienna Convention, which concerned the termination of the provisional application of a treaty, applied to multilateral treaties and, *mutatis mutandis*, to bilateral treaties. It allowed States a certain amount of discretion with regard to termination primarily because it might be impossible for a State to ratify a treaty despite having applied it provisionally, and termination should be possible on those grounds. However, even if the Commission allowed for the possibility or the need to unilaterally terminate the provisional application of a treaty, the *pacta sunt servanda* principle continued to apply and served as a deterrent to the abuse of such termination. Moreover, the *ex nunc* effects of the termination of a treaty, which were set out in article 70 of the Convention, were generally recognized as the codification of a rule of customary international law. Although, in practice, the obligations arising from the provisional application of a treaty were less definitive in nature than those resulting from its entry into force, he agreed with the Special Rapporteur that article 70, as a rule of customary international law, must be applied by analogy to the provisional application of treaties. That said, there could be cases in which certain obligations continued to be binding, as stipulated in article 70, paragraph (1) (*b*), of the Convention, in order to protect the interests or the confidentiality of a third party, as well as to protect legal certainty.

25. Notwithstanding, in the absence of an express agreement between the parties to a treaty, it was not always certain which obligations fell into the category described in article 70, paragraph (1) (*b*). Given that uncertainty, the conferral of a wide amount of discretion with regard to unilateral termination would jeopardize legal certainty in the area of the provisional application of treaties.

[278] *Yukos Universal Limited (Isle of Man)* v. *the Russian Federation, Interim Award on Jurisdiction and Admissibility of 30 November 2009*, para. 318.

Consequently, it was desirable to limit, as far as possible, the right to unilaterally terminate the provisional application provided for in article 25, paragraph 2, of the 1969 Vienna Convention. For example, that right might be recognized solely in the event of the non-ratification of a treaty by a State. Such a solution would be consistent with article 26 and the principles relating to the validity of treaties based on their interpretation.

26. A breach of a treaty that was applied provisionally could entail the international responsibility of the State, as indicated in article 73 of the 1969 Vienna Convention. In such cases, the injured State had at least two possible means of recourse: it could invoke either the international responsibility of the offending State or else the rules for terminating the provisional application of a treaty that were set out in article 25, paragraph 2, of the Convention.

27. Mr. HASSOUNA said that the Special Rapporteur should elaborate on the relationship between provisional application and entry into force, since some States saw those two procedures as separate and governed by distinct legal regimes, while others saw them as legally indistinguishable. In view of the fact that, during the discussion in the Sixth Committee, many States had indicated that recourse to provisional application should be subject to the relevant provisions of domestic law, the Special Rapporteur should clarify the situations in which domestic law was either relevant or irrelevant. Doing so did not require a comparative study of States' domestic legislation on the provisional application of treaties, nor was it the Commission's role to undertake such a study. Rather, its role was to identify the practice of States in the area of international law, and domestic law was relevant in that matter only to the extent that it involved the application of international law concepts, rights, obligations or procedures.

28. Since it was a well-accepted proposition that the provisional application of treaties produced binding legal effects, the Special Rapporteur should focus his efforts in future reports on situations of uncertainty surrounding those legal effects. The two conditions set out in article 25 of the 1969 Vienna Convention could be interpreted as meaning that when a State made a unilateral decision to provisionally apply a treaty, and when such application was not provided for in the treaty itself, the other States parties had to agree to its unilateral undertaking. Yet the excerpt concerning unilateral declarations from the judgment of the International Court of Justice in the *Nuclear Tests (Australia* v. *France)* case, which was reproduced in paragraph 37 of the second report, indicated that no subsequent acceptance of the unilateral declaration by other States was required. If that interpretation applied to a unilateral declaration of the provisional application of a treaty, then the Special Rapporteur should clarify how it could be reconciled with the two possibilities envisaged in article 25 of the 1969 Vienna Convention. Similarly, the relationship or distinction between a unilateral undertaking and a provisional application of a treaty should also be clarified.

29. It was not clear from the second report when States could terminate or revoke provisional application agreements without consequences, and when such action might incur State responsibility. The Special Rapporteur pointed out that unilateral declarations of provisional application could not be revoked arbitrarily. It would thus be appropriate to explain in the commentary the standard test for arbitrariness and the circumstances that might give rise to assertions of arbitrary revocation.

30. Paragraph 70 of the second report stated that the regime resulting from the termination of provisional application must be, *mutatis mutandis,* the same as that resulting from the termination of a treaty. However, it was not clear whether the regime in question was that of domestic or international law. Paragraph 75 of the second report, which referred to the practice of Mexico, seemed to suggest that what was meant was the domestic law regime. Since it was not self-evident, the answer to that question should be clearly explained in the commentary.

31. The question concerning the duration of the provisional application of a treaty was an important one. Did the fact that a State had provisionally applied a treaty and was not subsequently in a position to ratify it imply the treaty's *de facto* termination? Or did its provisional application extend indefinitely? Likewise, did the fact that a treaty could not be denounced or terminated mean that its provisional application could not be terminated either? Such questions required clarification by the Special Rapporteur.

32. The remaining unanswered questions that had been set out by the Special Rapporteur in his first report[279] and that should be addressed in future reports included: the issue of flexibility in relation to provisional application; the procedural requirements for provisional application; the relationship of provisional application to other provisions of the 1969 Vienna Convention; and the nature and drafting of treaties for which guidelines or model clauses on provisional application would apply.

33. The Commission should renew its request to States to provide it with information on their practice relating to the provisional application of treaties. In the meantime, the Special Rapporteur could independently research cases from international courts and arbitral bodies that had adjudicated disputes on the provisional application of treaties, consult the work of academic writers, and obtain relevant information from the bilateral relations maintained by legal advisers and other officials of his Government with their counterparts in other States.

34. Ms. JACOBSSON said that she supported the Special Rapporteur's proposal to exclude from the topic the legal effects of the provisional application of treaties at the domestic level and the conclusion that the provisional application of treaties created a legal relationship and therefore produced legal effects. She also shared his view that a comparative analysis of domestic law was not necessary. In view of his contention that the entry into force of a treaty fell under a different legal regime than its provisional application, it would be helpful if, in a future report, he could elaborate on the difference between the two, which was not always obvious. Similarly, the distinction between a unilateral act of a State and the provisional application of a treaty required further consideration, since

[279] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/664.

a unilateral act of a State could not create any rights for that State beyond what was accepted by other States, but it might create obligations, while the provisional application of a treaty could entail the conferral of rights on the State that had decided to apply a treaty provisionally.

35. In paragraph 35 of his second report, the Special Rapporteur identified four types of situations relating to provisional application that were covered by article 25 of the 1969 Vienna Convention. An interesting example of the fourth type of situation, namely, when a treaty said absolutely nothing about provisional application, was that of the declaration made by the Syrian Arab Republic[280] upon accession to the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction. That example, described in paragraphs 66 to 68 of the second report, raised a number of questions that might be addressed in the Commission's future deliberations on the topic.

36. A State could avail itself of the international law mechanism of the provisional application of a treaty under article 25 if provisional application was provided for in the treaty itself or if the States that had negotiated the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction had in some other manner so agreed. Since a commitment to dismantle weapons of mass destruction was incompatible with provisional arrangements, it was easy to understand why the Convention did not contain any such provision and why there were no indications that the negotiating parties had agreed in some other manner to allow for such arrangements. Nevertheless, given the declaration made by the Syrian Arab Republic in its note of accession that it would apply the Convention provisionally for one month prior to its entry into force for that State, the Secretary-General of the United Nations, in his capacity as depositary of the treaty, had informed all the other parties to the Convention of that declaration. As the implementing body of the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, the Organisation for the Prohibition of Chemical Weapons, by means of its Executive Council, had accepted the declaration of the Syrian Arab Republic. It had done so based on the extraordinary nature of the situation and the fact that no State party had declared its opposition after having been notified of it by the depositary, although the Council had also specified that its decision was not intended to create a precedent. An indirect consensus among all States parties had thus been found to exist. And although the prerogative of interpretation belonged to the parties to a treaty, not to an organ established by the treaty, unless expressly provided therein, it sometimes fell to such an organ to take a stance on a particular treaty provision without any guidance from the States parties as a whole. However, she wondered whether such a prerogative extended to the interpretation and application of article 25 of the 1969 Vienna Convention and whether, in availing itself of that prerogative, the Executive Council had spoken on behalf of all the States parties to the Convention.

37. The procedure for accepting the provisional application of the Convention by the Syrian Arab Republic raised a number of interesting legal questions. One question was whether the declaration by the Syrian Arab Republic and its implementation should be treated as a provisional application of a treaty under the 1969 Vienna Convention or as a unilateral act of State in which the Syrian Arab Republic unilaterally imposed obligations on itself that were intended to have *erga omnes* effect. In light of the Commission's previous work on unilateral acts of States, the declaration appeared to meet all the criteria for being considered a unilateral act. Other questions were whether silence or acquiescence on the part of States parties was ever to be construed as meeting the "in some other manner so agreed" criterion of article 25; how the distinction between negotiating States and States parties should be determined and applied; and whether the Syrian Arab Republic could have withdrawn its legal undertaking to apply the treaty provisionally without any legal consequences.

38. Admittedly, the case of the Syrian Arab Republic and its accession to the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction was a rather unusual one involving high political stakes, the threat of the use of force, a previous history of chemical weapons use and serious violations of international law. It had also involved two major international organizations: the United Nations Organization and the Organisation for the Prohibition of Chemical Weapons—each with its own mandate, internal structure and role to play.

39. With regard to the legal consequences of the breach of a treaty applied provisionally, she supported the Special Rapporteur's conclusion, in paragraph 95 of his second report, that he would not go into further detail on the responsibility regime, but would merely reiterate the applicability of the existing legal regime. At the same time, she proposed that this point be made in an explicit reference to be included in the eventual outcome of the Commission's work on the topic. She would welcome additional analysis concerning other potential legal consequences of the breach of a treaty applied provisionally, to which the Special Rapporteur had alluded in paragraphs 86 to 90 of his second report.

40. Lastly, she supported the Special Rapporteur's plan to address in future reports the provisional application of treaties by international organizations, since agreements between the European Union and third States could serve as interesting examples of legally acceptable solutions to the provisional application of treaties between two parties.

41. Mr. CANDIOTI said that he agreed with the Special Rapporteur's approach of focusing on the legal effects of the provisional application of treaties. He also agreed that a clear distinction should be made between the provisional entry into force of a treaty and the provisional application of that treaty.

42. He further agreed that, at least at the present stage, the Commission should deal with the topic solely from an international law perspective and not consider questions relating to the domestic law of States. However,

[280] Depositary notification No. C.N.592.2013.TREATIES-XXVI.3, 14 September 2013. Available from https://treaties.un.org (*Depositary*, then *Depositary Notifications*).

such questions could not be ignored. He shared Mr. Park's views on the matter, in particular with regard to the relevance of articles 27 and 49 of the 1969 Vienna Convention. However, the Commission must seek primarily to clarify the scope, modalities and effects of provisional application within the framework of the international law of treaties in order, among other things, to contribute to a better understanding of the implications for States of any decision to apply a treaty provisionally.

43. Other aspects of the topic which had given rise to comment in the Sixth Committee included the ways in which consent might be expressed to provisional application. As the 1969 Vienna Convention and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986 Vienna Convention) dealt with treaties concluded in written form, a joint notification or declaration of provisional application should be recorded in one or more written instruments and made known to the other States entitled to become parties to the treaty. A written agreement provided the authors themselves with greater certainty and transparency and allowed other actual or potential parties to the treaty to become aware of the situation created.

44. He endorsed the distinction drawn by the Special Rapporteur between, on the one hand, an agreement on provisional application concluded between two or more States that had approved or signed a treaty and, on the other, a unilateral notification of provisional application by one such State. In his view, article 25 of the 1969 Vienna Convention envisaged only the scenario of a provisional application arising from an agreement, either provided for in the treaty itself or resulting from a subsequent decision of two or more negotiating States. He did not consider that such an agreement should be described as a parallel agreement. It was an agreement that should remain within the treaty regime in question, as was the case with agreements that arose as a result of the formulation and acceptance of reservations to the provisions of the treaty. In any event, the feasibility of a provisional application, if it was not expressly authorized under the treaty, would depend on the characteristics and content of the treaty concerned and would have to be compatible with that treaty's object and purpose.

45. The Special Rapporteur's thoughts on the eventuality of a unilateral declaration of provisional application should be assessed in light of the Commission's guiding principles applicable to unilateral declarations of States capable of creating legal obligations. Nonetheless, the effects of a unilateral declaration might be more limited than, and in any event different from, those arising from an agreement between one or more negotiating States.

46. Accordingly, the two scenarios should be treated separately. First, all the aspects of the provisional application of a treaty agreed by two or more negotiating States should be clarified. Then, the effects of provisional application decided unilaterally should be considered. It would also be necessary to analyse the consequences of the distinction set forth in article 25 of the 1969 Vienna Convention between the provisional application of a treaty and provisional application of part of a treaty.

47. On the other hand, he saw no *prima facie* obstacles to the project dealing with the provisional application of treaties between States and international organizations or between international organizations, in accordance with article 25 of the 1986 Vienna Convention, which was substantially identical to article 25 of the 1969 Convention.

48. He agreed on the need to gather more information on the attitude and practice of States and, possibly, international organizations. It would perhaps be useful to prepare a questionnaire on State practice focusing on specific points of interest.

49. A further matter was the question of the final form of the Commission's work on the topic. The Special Rapporteur appeared to favour the drafting of conclusions, recommendations or guidelines. However, in the 2011 syllabus prepared by Mr. Gaja, which had given rise to the topic, the possibility had been mentioned of preparing draft articles to develop and supplement article 25 of the 1969 Vienna Convention. It had been further suggested that model clauses be drafted to provide guidance to States wishing to apply a treaty provisionally.[281] In his view, the Special Rapporteur should keep all options open as to the final form of the Commission's work, and consider the possibility of reflecting the conclusions of his third report in draft articles.

50. Mr. VÁZQUEZ-BERMÚDEZ said that the Commission, through its work on the topic, could make a valuable contribution to a better understanding of the provisional application of treaties and to the clarification of a number of issues, including the ways in which negotiating States or international organizations agreed to apply treaties provisionally, the scope of provisional application and the legal nature of the rights and obligations arising from provisional application.

51. States had expressed keen interest in the topic. They had highlighted the fact that provisional application produced a series of legal effects requiring clarification and had suggested that the Commission analyse the ways in which consent to the provisional application of a treaty could be expressed. Accordingly, the Commission needed to conduct as comprehensive an analysis as possible of the various aspects of provisional application, in particular those features that distinguished it from other legal concepts. In that regard, it was important to differentiate between provisional application and provisional or interim agreements. Provisional application should also be distinguished from treaty-related agreements creating committees to prepare the mechanisms provided for under the treaty in question, such as the Preparatory Committee on the Establishment of an International Criminal Court.

52. As provisional application was a practice to which States had frequent recourse, it was essential that its legal nature and effects be clarified. As Mr. Forteau had pointed out, it was also important to elucidate the legal nature of agreements providing for provisional application in order to determine the norms that were applicable and the regime of provisional application thus established.

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[281] *Yearbook … 2011*, vol. II (Part Two), annex III, p. 200, paras. 11–12.

53. Likewise, States and international organizations should have a clear idea as to the different clauses on provisional application that could be included in treaties or parallel agreements. Some of the most complex of those clauses could create various provisional application regimes, according to the actions of States in applying the provisions contained therein. Depending on the clause in question, provisional application could represent either an obligation or merely an option for negotiating States or organizations.

54. It should be noted that provisional application could coexist with a reservation to a treaty, if the reservation were made at the time of signature, for example, and the treaty applied provisionally from the time of signature or adoption of the treaty.

55. It might be appropriate to take account of domestic legislation, insofar as that legislation determined recourse to provisional application. Practice varied greatly in that regard: in some States, provisional application was limited to treaties dealing with specific matters, such as trade; in others, provisional application was not permitted; and in yet others, recourse was had to provisional application even in the absence of specific legislation in that connection.

56. As to the source of obligations, the Special Rapporteur's identification of at least four types of situations in which provisional application could result from an agreement was helpful. With regard to the last of the situations mentioned, namely that of a treaty that said absolutely nothing about provisional application, he said that it should be analysed in light of the requirement set out in article 25, paragraph 1, of the 1969 Vienna Convention that the negotiating States must have agreed to apply a treaty provisionally. That analysis was called for in view of the Special Rapporteur's assertion that, in certain cases, the decision of a State to apply a treaty provisionally was an autonomous unilateral act, governed only by the intentions of the State in question.

57. He agreed with the Special Rapporteur that provisional application had legal effects that gave rise to rights and obligations in international law. He pointed out that such effects did not depend on the manner in which provisional application had been agreed; furthermore, the violation of obligations resulting from provisional application engaged the international responsibility of the State or international organization in question. It was therefore important that this issue be reflected in the final product.

58. Sir Michael WOOD said that he would like to begin by making four general comments. First, like many other speakers, he agreed with the Special Rapporteur's main conclusion that provisional application had legal effects, a conclusion that was supported by recent case law and State practice. The Commission should take a clear position that, subject to anything specific in the treaty, the rights and obligations of a State that had agreed to apply a treaty or part thereof provisionally were the same as if the treaty were in force.

59. Second, it was doubtful how much assistance could be derived for the topic from the Commission's guiding principles applicable to unilateral declarations of States capable of creating legal obligations. Acceptance by a State of the provisional application of a treaty or part thereof would not, in his view, normally be analysed as a unilateral declaration within the scope of the guiding principles. Rather, like an instrument of ratification or accession, or the lodging of a reservation or an objection to a reservation, it was a treaty action that was governed by the law of treaties. However, a possible exception was the provisional application of the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction by the Syrian Arab Republic, which might constitute a case of a unilateral declaration accepting obligations under a treaty.

60. Third, he did not really understand the distinction the Special Rapporteur sometimes seemed to make between the provisional application of a treaty internally within the State and its provisional application internationally. In his view, the topic was concerned only with the provisional application of treaties as a matter of international law. Although provisional application might have effects in the domestic legal system and might need to be given effect in domestic law, it was not the Commission's concern.

61. Fourth, the second report appeared in places to overlook the distinction between the material source of the obligation to apply the treaty provisionally and the source of the rights and obligations that were provisionally applied. The obligation to apply a treaty provisionally might be triggered by a unilateral act. Nevertheless, the source of the rights and obligations provisionally applied remained the treaty itself. However, at times the Special Rapporteur, in his second report, explicitly referred to the source of the rights and obligations provisionally applied as being a unilateral act.

62. Turning to the question of the source of the rights and obligations arising under provisional application, he was not convinced of the usefulness, in terms of legal analysis, of the Special Rapporteur's categorization of the four types of situations under which article 25, paragraph 1, of the 1969 Vienna Convention might find practical application. After describing the situations, the report stated that the source of the obligations incurred as a result of provisional application might take the form of one or more unilateral declarations or the form of an agreement. That was somewhat confusing: he understood that it was not the source of the obligations incurred as a result of provisional application that might take a unilateral or bilateral form, but rather the expression of acceptance of those obligations that could take unilateral or bilateral form. It was his view that provisional application was always application of the treaty as such, and thus the rights and obligations under provisional application would always derive from the treaty itself.

63. In that context, the Commission should be cautious about having recourse to the law on unilateral declarations. In the case of provisional application, a unilateral declaration was merely a response to a standing offer contained in the treaty to conclude an agreement to provisionally apply the treaty. That was quite different from the case of unilateral declarations, such as the one by France in the *Nuclear Tests (Australia* v. *France)* case, where a State unilaterally assumed self-standing, autonomous and independent obligations.

64. That distinction was especially important when considering issues concerning the interpretation of the obligations assumed by provisional application, the enjoyment and opposability of rights potentially created under provisional application and, in certain cases, the application of dispute settlement clauses. The way that each of those issues was to be addressed might differ significantly depending on whether the treaty itself was the source of the rights and obligations to be provisionally applied or, instead, a unilateral declaration. As previously noted, he held the view that it was the treaty. Merely looking at the form of the instrument by which those obligations were assumed was not the right approach; what mattered was whether there was an underlying agreement to apply the treaty provisionally, not whether that agreement was potentially concluded in one or two steps.

65. With regard to the issue of rights under a provisionally applied treaty, covered in paragraphs 44 to 52 of the second report, he questioned whether a treaty provisionally applied under the third or fourth types of situation described by the Special Rapporteur could give rise to rights for the State that provisionally applied it. The current analysis covered only situations where States agreed that a treaty might be applied provisionally from the time of its adoption or its signature, although there was no particular reason why that should not be the case where, for example, a treaty left open that possibility for States.

66. He then turned to the hypothetical example posed by the Special Rapporteur regarding the case of a State unilaterally declaring that it would provisionally apply the treaty without the treaty providing for that possibility and one of the negotiating States objecting. In his view, given the wording of article 25, paragraph 1 (*b*), of the 1969 Vienna Convention, which implied that the consent of all negotiating States was needed in such cases, the case should be understood not as one of provisional application, but either as a typical unilateral assumption of international obligations or as an offer to apply the treaty provisionally that had been declined.

67. Section D of chapter II of the second report, entitled "Termination of obligations", appeared to cover two quite distinct matters at the same time, namely the right to terminate provisional application and the legal consequences of such termination. In his opinion, those matters should be considered separately.

68. With regard to the legal effect of the termination of provisional application on the rights and obligations that had accrued prior to termination, the Special Rapporteur referred, by way of analogy, to article 70 of the 1969 Vienna Convention. While that seemed to make sense, it would be helpful if the Special Rapporteur could provide an authoritative reference in that regard.

69. The Special Rapporteur's treatment of the right to terminate provisional application seemed questionable. He neither understood nor was he aware of any authority for the proposition, in paragraph 81 of the second report, that a State that had decided to terminate the provisional application of a treaty was subject to the requirement that it should explain to certain other States whether that decision had been taken for other reasons. Moreover, it was not clear what was meant by "other reasons".

70. He could see no basis for the assertion, in paragraph 82 of the second report, that provisional application could not be revoked arbitrarily. It appeared to be based on a false analogy with principle 10 of the guiding principles applicable to unilateral declarations of States capable of creating legal obligations. It seemed to him that it was the essence of provisional application that, subject to anything specific said in the treaty or that could be derived from the particular circumstances of the case, it could be terminated at will.

71. As to the future programme of work set out by the Special Rapporteur in his introductory speech, Sir Michael welcomed the Special Rapporteur's intention to collect and analyse as much State practice as possible for the next report and to explore further the question of international organizations. The Commission might also wish to consider whether the rules of customary international law on the provisional application of treaties were the same as those in the Vienna Conventions.

72. However, the Special Rapporteur should not feel inhibited in taking the work forward by the relative lack of information from States about their practice. While it would be very helpful to have such information directly from States, it was not essential, since there was a good deal of information in the public domain, and the issues of law involved were relatively clear. He encouraged the Special Rapporteur to propose draft texts in his next report.

The meeting rose at 1 p.m.

3233rd MEETING

Wednesday, 30 July 2014, at 3 p.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Provisional application of treaties (*continued*) (A/CN.4/666, Part II, sect. E, A/CN.4/675)

[Agenda item 8]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. ŠTURMA said that, since the topic of the provisional application of treaties was very important from the point of view of both the theory and the practice of international law, the Commission's work on it should culminate in a set of guidelines, or conclusions, which might also shed light on issues not elucidated by article 25 of the 1969 Vienna Convention.

2. He agreed with the Special Rapporteur first, that the provisional application of treaties produced certain legal effects and could create certain rights and obligations under international law and, second, that the Commission did not need to concern itself with domestic legislation. The Special Rapporteur's intention to collect more information on State practice before presenting any conclusions therefore seemed rather illogical. The paucity of information supplied should not prevent the Special Rapporteur from presenting at least some draft conclusions.

3. The key point which should be clarified with respect to article 46, paragraph 1, of the 1969 Vienna Convention was whether the limitations that internal law placed on a State's ability to agree to the provisional application of a treaty should be regarded as known to other States, or whether they had to be notified.

4. As for the temporal aspect of provisional application referred to in paragraph 35 (*a*) of the second report, it should be noted that, in the practice of the European Union, the provisional application of treaties from the time of their adoption, albeit rather unusual, had proved its worth in practice. However, some States' constitutions permitted provisional application only after the ratification of a treaty.

5. He was unconvinced by the analysis of unilateral acts as a legal basis for provisional application in paragraphs 37 to 41 of the report. The declarations made in the *Nuclear Tests (Australia* v. *France)* case had been independent acts governed solely by the intentions of the State and they had created a new legal situation for it, whereas acts by States in relation to an international treaty did not seem to be fully autonomous, because they depended on a treaty for their provisional application. The statement in paragraph 55 of the second report that the scope of the obligations [arising from provisional application] might not exceed what was expressly set out in the treaty was correct and should be reflected in one of the conclusions.

6. The issue of reservations in the context of provisional application was also closely linked with the expression of will. A distinction should be drawn between treaties that included an opt-in or opt-out clause on provisional application and those that did not. It was probably only the latter type of treaty to which States could formulate a reservation on signature or ratification.

7. The Special Rapporteur's suggestion that article 70 of the 1969 Vienna Convention applied to the termination of provisional application required more detailed examination. Whether termination released the parties from any obligation further to perform the treaty (para. 1 (*a*)) would depend on the reasons for and circumstances of the end of provisional application. The second report correctly reflected the legal consequences of a breach of a provisionally applied treaty. The principle *inadimplenti non est adimplendum* would apply only if a State failed to notify other States of its intention not to become a party to the treaty. Furthermore, as the case concerning the *Gabčikovo–Nagymaros Project (Hungary/Slovakia)* had confirmed, the consequences of a breach of a treaty (termination or suspension) were not automatic. The regime of responsibility would indeed apply to cases where a State breached obligations arising from the provisional application of a treaty. The conclusion that article 12 of the articles on responsibility of States for internationally wrongful acts[282] covered provisional application had been supported by the 2009 decision of the Permanent Court of Arbitration in *Yukos Universal Limited (Isle of Man)* v. *the Russian Federation*.

8. Lastly, he hoped that the Special Rapporteur would provide a more precise plan of future work.

9. Mr. MURPHY, after commending the Special Rapporteur's desire to develop further information regarding State practice, agreed with other members that often the Commission did not receive information from States systematically. The Special Rapporteur might therefore need to find some information himself and other information from the scholarly literature. There might not be a significant amount of State practice, and expectations would need to be adjusted accordingly.

10. He concurred with the Special Rapporteur's conclusion that the provisional application of a treaty undoubtedly created a legal relationship and therefore had legal effects and that those effects extended beyond the obligation expressed in article 18 of the 1969 Vienna Convention. However, the Special Rapporteur could have been more systematic in his legal analysis, starting with the Commission's views prior to the 1968–1969 United Nations Conference on the Law of Treaties, and moving on to the views expressed at the Conference and also subsequent case law, scholarly literature and the positions taken by States. The information was scattered around the second report or the 2013 memorandum prepared by the Secretariat,[283] but it could usefully have been consolidated. He agreed with the Special Rapporteur's intention not to carry out a comparative study of national laws regarding the ability of States to apply a treaty provisionally. Such a study would be helpful in establishing a customary rule of international law or a general principle of law, but less useful when the issue concerned divergent national processes for entering into treaty commitments.

11. In chapter II of the second report, some assertions were accurate, others doubtful and still others incorrect. He agreed with the assertions in paragraphs 32 and 33 that the source of the obligation to apply a treaty provisionally might arise from a provision of the treaty or a parallel agreement, that the intention to apply a treaty provisionally might be expressed or tacit and that the exact scope of the legal obligation created depended, in the first instance, on what that provision or parallel agreement stated. In paragraph 35 of his second report, the Special Rapporteur listed four types of situations in which provisional application might occur, but it would be desirable to indicate examples for each. It was not clear how a scheme under which a State was required to opt out rather than opting into the scheme, such as article 45 of the Energy

[282] General Assembly resolution 56/83 of 12 December 2001, annex. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

[283] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/658.

Charter Treaty, fitted into the situations listed. It seemed that there might be no examples of the fourth type of situation, although Ms. Jacobsson had suggested that actions by the Syrian Arab Republic, set out in paragraph 66 of the second report, might fall into that category.

12. He could not endorse the Special Rapporteur's view that the law on unilateral acts of States was a set of background rules governing the provisional application of treaties, or at least governing some of the four situations. The Special Rapporteur should first clarify to which of the four situations he thought that body of law related. He mentioned "unilateral declaration" in the context of the situation described in paragraph 35 (*c*), but he might also apply it to the situations in paragraph 35 (*b*) or (*d*), since all three situations involved some kind of unilateral act. It was confusing to suggest that the law on the provisional application of treaties was different for the situation described in paragraph 35 (*a*) than for the other situations. Moreover, he doubted whether the law on unilateral acts of States was directly relevant to the topic. In each of the four situations, there was a treaty, there was a rule of the 1969 Vienna Convention relating to provisional application of that treaty and there was a decision by a State to accept provisional application; once that acceptance occurred, there arose a treaty-based obligation between multiple States, not just an obligation for one State. Such a situation was not like the unilateral act issued in the *Nuclear Tests* cases or the scenarios studied by the Commission for the 2006 guiding principles applicable to unilateral declarations of States capable of creating legal obligations:[284] the existence of a treaty made all the difference. In ratifying a treaty, or agreeing to apply a treaty provisionally, a State technically engaged in a unilateral act, but neither act should be placed under the heading "unilateral acts of States". The provisional application of a treaty remained a treaty-based relationship, and the State took advantage of an arrangement for provisional application that had been agreed upon by all the States associated with that treaty.

13. He considered that the form an agreement took was irrelevant to the scope of the rights and obligations assumed by a State. What mattered was the content of the underlying treaty and the content of the States' agreement to apply that treaty provisionally. He questioned the assertions made in paragraphs 53 to 55 of the second report, in particular that, in the situations described in paragraphs 35 (*b*) and (*c*), the nature and scope of the obligation arose from the unilateral declaration of the State. That assertion was not in keeping with the example of the Arms Trade Treaty given by the Special Rapporteur in paragraph 56. When a State submitted its declaration accepting provisional application of the Arms Trade Treaty, it could not provisionally apply whichever articles of the treaty it wished. It could provisionally apply only articles 6 and 7, and it must apply both, not one or the other. The nature and scope of the obligation was not set by the unilateral declaration of the State alone, but by that declaration in conjunction with the underlying treaty and, in his view, with article 25 of the 1969 Vienna Convention, either as treaty law or as a rule of customary international law.

14. Moreover, he doubted that acceptance by a State of compulsory jurisdiction by the International Court of Justice was a unilateral act within the meaning of the Commission's 2006 guiding principles applicable to unilateral declarations of States capable of creating legal obligations. The analogy between such acceptance and the provisional application of treaties was not a good one. In its judgment on jurisdiction and admissibility in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, the Court was giving its opinion on the ability of the United States to modify a declaration in the context of the specific language of the two declarations by the United States, read in conjunction with article 36 of the Statute of the International Court of Justice. The Court was not issuing a general statement about unilateral declaration or even generally about declarations accepting the Court's compulsory jurisdiction. By contrast, any declaration relating to provisional application must be read in the context of the specific language of the underlying treaty, which might or might not allow the declaring State to amend the scope and content of its declaration and must be read in the context of article 25, paragraph 2, of the 1969 Vienna Convention.

15. He did not accept the distinction drawn by the Special Rapporteur, in paragraphs 59 to 64 of his second report, between the obligations resulting from provisional application that produced effects exclusively in the domestic sphere of the State that had opted for such a mechanism and obligations that produced effects at the international level. The fact that some treaties spoke largely to the conduct of a State within its domestic sphere, whereas others spoke to a State's conduct in the international sphere had no relevance to either the ratification of the treaty or its provisional application. Moreover, the Special Rapporteur was incorrect in saying that States provisionally applying articles 6 and 7 of the Arms Trade Treaty had undertaken to do so only in the domestic sphere; in his view, they had undertaken to apply the articles in the international sphere as well. A far more important issue was that there were presumably some aspects of a treaty that were not provisionally applied, because they presupposed the actual entry into force of the agreement. For example, if a treaty envisaged referral of disputes to a new treaty body, but that treaty body existed only after entry into force, presumably obligations within the treaty with respect to the treaty body were not provisionally operative.

16. Section D of chapter II of the second report addressed the termination of the provisional application of a treaty. He would have preferred to see a discussion of article 25, paragraph 2, of the 1969 Vienna Convention, which appeared to allow for termination upon notification with no requirement of any waiting period. Moreover, while the notification should apparently indicate a lack of intention to become a party to the treaty, article 25 did not say that a State could not act arbitrarily. That being so, he doubted that paragraph 82 of the second report was correct, since it relied heavily and, in his view, inappropriately, on the Commission's guiding principles applicable to unilateral declarations of States capable of creating legal obligations. The report should also have discussed whether it made any difference that the underlying treaty, once a State became a party, expressly forbade termination, expressly allowed for termination at will or after a

[284] *Yearbook … 2006*, vol. II (Part Two), pp. 161 *et seq.*, para. 176.

specified period of time, or was silent as to termination. His own view was that any provisions in the underlying treaty on termination were irrelevant to whether a State could terminate provisional application. According to article 25, paragraph 2, of the 1969 Vienna Convention, a State could terminate readily, no matter what the underlying treaty said, principally because it could not be regarded as bound, under a provisional scheme, to aspects of the treaty that related to adherence, withdrawal or termination of the treaty itself. Contrary to the Special Rapporteur's assertion in paragraph 81, the provisional application of a treaty was not subject to a requirement that the State should explain to the other States for which the treaty applied provisionally whether the decision to terminate had been taken for reasons other than its intention not to become a party. Article 25 of the 1969 Vienna Convention had been crafted in a way that allowed a State to escape rather easily from provisional application: all it need do was to give notice pursuant to paragraph 2 of the article. There were no other requirements and no ability to see what political or other factors motivated the notification.

17. He agreed with the Special Rapporteur's assertions in paragraphs 71, 80 and 83 to 85 of his second report. He was also largely in agreement with chapter III of the report, which concerned the legal consequences of a breach of a treaty that was provisionally applied. He questioned, however, the statement in paragraph 89 that there was a "universally recognized international legal principle *inadimplenti non est adimplendum*". The principle was, in fact, highly contested, at least in the sense of whether it had survived the emergence of modern treaty law under the 1969 Vienna Convention. One example of the contested nature of the principle could be seen in the case before the International Court of Justice concerning *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece)*, where the parties had robustly litigated for and against the principle, and the Court had found it unnecessary to determine whether that doctrine formed part of contemporary international law. The Special Rapporteur had not indicated whether he intended to develop guidelines or model clauses. His own opinion was that a modest set of guidelines or conclusions would be helpful, starting with the language of article 25 of the 1969 Vienna Convention and then addressing several of the points set forth in the first and second reports, in addition to further issues, such as the provisional application of treaties by international organizations.

18. Mr. NOLTE said that, before addressing specific points in the second report, he should mention that he had submitted an expert opinion on some aspects on the topic of the provisional application of treaties in an arbitral proceeding under the Energy Charter Treaty. That had given rise to the interim award on jurisdiction and admissibility of November 2009, in the case of *Yukos Universal Limited (Isle of Man)* v. *the Russian Federation* before the Permanent Court of Arbitration. The Special Rapporteur might wish to assess the award in his next report. He shared Mr. Forteau's view that the Special Rapporteur should undertake an assessment of the available practice and take a more inductive approach to the topic. The proposition, in paragraph 14 of the second report, that the provisional application of a treaty undoubtedly created a legal relationship and therefore had legal effects was not very clear, but its author was the Commission itself, in its commentary to the 1966 draft articles on the law of treaties.[285] There were, however, several differences between the 1966 commentary and the terminology used in the second report on the provisional application of treaties, and those differences made it clear why the Commission should make an effort to formulate a clearer statement.

19. First, the 1966 commentary said that the clauses providing for the provisional application of a treaty had legal effect, not that provisional application as such had a legal effect. However, in his view, it should be made clear that provisional application had a legal effect only if a pertinent agreement on such application had been established between the signatories. Such an agreement typically derived from a clause providing for provisional application, but it must always be ascertained whether a particular clause was binding on the parties and was meant to create a binding obligation to apply the treaty provisionally.

20. Second, the 1966 commentary and the formulation in the second report was that the former stated that clauses providing for provisional application brought the treaty into force on a provisional basis. However, the United Nations Conference on the Law of Treaties had not accepted the Commission's proposal regarding the notion that such clauses brought the treaty into force on a provisional basis. It was thus not clear what the Special Rapporteur meant when he said that provisional application had legal effects.

21. Third, whereas the 1966 commentary spoke of the bringing into force of the treaty, the second report referred to the creation of a legal relationship. It was not clear whether such a relationship would be treaty-based or based on a unilateral promise or a general principle of law, such as good faith. He shared the doubts expressed by other members as to whether clauses that provided for provisional application should be construed as expressing unilateral promises that would be legally binding under the principles adopted by the Commission in 2006. The Commission should seek clarity in that regard.

22. Although, understandably, the Special Rapporteur did not wish to use more specific terminology, he should make it clear that the term "provisional application" did not have any inherent legal effects: it was the agreement between the parties to apply a treaty provisionally that created the legal relationship, and, while it might be that some additional legal effects from the agreement by the parties to provisionally apply a treaty might derive from general principles of law or other sources, such effects would indeed be derivative. Moreover, it was not just a matter of words; it went to the heart of the practice of agreeing on clauses providing for provisional application. States agreed on such clauses because they wished to apply the treaty before the internal procedures authorizing the State's consent to be bound had been completed. That wish was understandable, but it was equally understandable that a Government could not undertake a binding commitment that it was not authorized to undertake under its domestic law.

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[285] See *Yearbook … 1966*, vol. II, p. 229 (para. (1) of the commentary to article 22).

23. Under article 27 of the 1969 Vienna Convention, a State could not invoke provisions of its internal law for its failure to perform a treaty, but the article was not helpful in determining whether an agreement to provisionally apply created a legal obligation other than on the basis of the treaty itself, which had not yet entered into force. Article 25 of the Convention did not clearly state—and it was the task of the Commission to determine—whether article 27 constituted a rule of interpretation according to which, in case of doubt, the parties to a treaty containing a clause that provided for the provisional application of that treaty were thereby intending to create an obligation to provisionally apply the treaty until notice of termination under article 25, paragraph 2. There was much to be said in favour of such an interpretation of article 25, but its scope was necessarily restricted. The term "provisional application" did not have a fixed meaning or a particular legal character; everything depended on the specific agreement of the parties.

24. That was clearly so because, in the case of a clause on provisional application, the agreement of the parties concerned the power of a particular State body to bind the State, in a situation in which further domestic procedures were still necessary for the whole treaty to become binding. Governments could not enter into binding commitments, even on a provisional basis, if they indicated that there remained domestic hurdles to be removed or preconditions to be fulfilled in their legal system. That was why certain standard clauses were formulated in such a way as to limit any possible obligation under a clause providing for provisional application, in order to ensure that any such obligation did not go beyond what was permitted under domestic legislation. If Governments could not rely on such an understanding, they would not be prepared to incur the risk of agreeing on the provisional application of a treaty except by way of long and complicated clauses, in which their limitations under domestic law would be spelled out. Such a consequence would not be helpful in practice. Governments should be able to agree that they would apply the treaty as far as they could under their domestic legislation without having to explain the details of such legislation at the international level. Even if it was not immediately clear to the signatory States to what extent a particular signatory would be able to provisionally apply the treaty, the parties might well accept such lack of clarity in return for the expectation that some parts of the treaty would be implemented in the preliminary phase.

25. For the reasons stated by Mr. Forteau, Mr. Murphy and others, the statement, in paragraph 82 of the second report, that provisional application could not be revoked arbitrarily was questionable. True, the principle of *bona fides* applied, but a signatory State did not have to give a reason when it notified another signatory State that it was terminating the provisional application of a treaty. Such termination could be due to domestic political processes, for example, and should not be viewed as violating the principle of *bona fides*. In that connection, he recalled Mr. Forteau's assertion that the recent award in the *Matter of the Bay of Bengal maritime boundary arbitration between the People's Republic of Bangladesh and the Republic of India* had confirmed Mr. Forteau's doubts about the proposition adopted by the Commission in 2013 that a subsequent agreement under article 31, paragraph 3 (*a*), of the 1969 Vienna Convention need not necessarily be binding. Refuting that assertion, he drew attention to the fact that the Arbitral Tribunal had quoted the pertinent part of the Commission's report for 2013[286] and had simply said that it did not consider the particular exchange of letters in that case to be sufficiently authoritative to constitute a subsequent agreement between the parties (para. 165 of the award). Thus it had not said that a subsequent agreement under article 31, paragraph 3 (*a*), must be binding: it had not contested the Commission's proposition. Further countering Mr. Forteau's position, he pointed out that an agreement on the provisional application of a treaty was characteristically a formal treaty action, which was not necessarily the case for subsequent agreements or subsequent practice under article 31, paragraph 3, of the 1969 Vienna Convention.

26. The second report had provided an excellent basis for the Commission's debate. The main aspects of the topic that needed to be explored in future reports were the establishment of proper interpretation of clauses providing for the provisional application of treaties, and in particular whether the signatories intended thereby to create a legally binding obligation; the practical elements of treatymaking; the importance for Governments of respecting domestic laws and procedures; and the need to circumscribe the provisional application of treaties in such a way that the mechanism remained a useful tool for signatory States, without either deterring or creating false expectations.

27. Mr. KAMTO said that the Special Rapporteur's approach was too cautious; his intention not to draw conclusions until he had received more information on State practice might hamper his work, because past experience had shown that most States ignored questions from the Commission, or reacted only once the Commission had gone so far as to draft some articles, guidelines or conclusions. There was a sufficient amount of case law to shed light on at least some aspects of the topic under consideration.

28. The legal validity of a provisional application clause had to be ascertained from the standpoint of international law and in light of domestic law, since the provisional application of a treaty could certainly not produce legal effects unless the conditions for the validity of a treaty opposable *vis-à-vis* the parties were met, especially those of article 24, paragraph 4, of the 1969 Vienna Convention. If that were the case, provisional application would begin in principle as soon the text of the treaty was adopted.

29. Unlike the Special Rapporteur, he considered that it would be useful to conduct a comparative study of the requirements of domestic law with regard to the provisional application of a treaty, since in most countries the validity thereof was a matter of constitutional law. That view was further borne out by the fact that the Permanent Court of Arbitration had found that the legal validity of article 45 of the Energy Charter Treaty was an issue, not

[286] *Yearbook … 2013*, vol. II (Part Two), p. 28 (para. (5) of the commentary to draft conclusion 4).

of public international law, but of the constitutional law of one of the signatories to the dispute, which the Special Rapporteur mentioned in paragraph 29 of his second report. The Special Rapporteur was wrong to rely on the statement of the Permanent Court of International Justice quoted in paragraph 18 of his report, because the laws that were "merely facts"[287] were not devoid of effects under international law. Moreover, article 27 of the 1969 Vienna Convention, stating that a party might not invoke the provisions of its internal law as justification for failure to perform a treaty, was without prejudice to article 46 thereof, which attributed direct effects under international law to certain provisions of a State's internal law. In view of the findings of the International Court of Justice in paragraph 265 of its 2002 judgment in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening),* the Commission should determine what constituted a rule of internal law of fundamental importance for the signing of a treaty and what constituted the proper manner of publicizing it.

30. In France and almost all of the French-speaking countries, while the power to conclude treaties lay with the executive branch of Government, some categories of treaties had to be ratified by Parliament. In those countries, a treaty could be applied provisionally only if it pertained to a matter falling within the exclusive jurisdiction of the executive, or if the Parliament had given its prior authorization. The Special Rapporteur should look into those aspects in order to formulate draft conclusions, guidelines or articles on the conditions governing the validity of provisional application clauses.

31. Although article 25 of the 1969 Vienna Convention specified that provisional application stemmed from an agreement between the parties or the negotiating States, there was no formal prohibition on a State making a unilateral declaration regarding provisional application outside that rule. The issue that would then arise would be the effects which that declaration would produce, especially when the treaty was silent on the matter of provisional application. With reference to paragraph 60 of the report, it would be interesting to know whether, by means of a unilateral declaration of commitment to apply a treaty provisionally, a State could create obligations for other States before the entry into force of that treaty, when those States had not signed the provisional application clause.

32. A distinction should be drawn between the provisional application of bilateral and multilateral treaties. As far as the latter was concerned, provisional application gave rise to a variety of situations with regard to States that had taken part in all or some of the negotiations, States that had participated in negotiations and those that had not, and States that had decided to apply the treaty provisionally and States that had acceded to a treaty already in force. In accordance with article 19 of the 1969 Vienna Convention, a reservation could be formulated when a treaty was signed, in other words during its provisional application. That was another aspect that the Special Rapporteur should explore.

33. Mr. KITTICHAISAREE said that, since the provisional application of a treaty would depend, *inter alia,* on the provisions of domestic law and the particular circumstances of each State, the identification of State practice, as reflected in domestic laws, would be instructive.

34. It was unclear how the Special Rapporteur had arrived at the conclusion, in paragraph 14 of his second report, that provisional application had legal effects beyond the obligation not to defeat the object and purpose of the treaty in question, as set out in article 18 of the 1969 Vienna Convention. The Special Rapporteur alluded to reservations in paragraph 25; however, it would be useful to determine whether the rules on reservations contained in articles 19 to 23 of the Convention covered provisionally applied treaties as well. The Special Rapporteur might find it helpful to look at the practice of States that considered the provisional application of treaties to be merely a "gentlemen's agreement" without legal effects. As to paragraphs 48 and 49, he should have explained why States attending the United Nations Conference on the Law of Treaties had opted for the term "provisional application" rather than "provisionally enter into force". In paragraphs 60 to 68 of his second report, the Special Rapporteur drew a distinction between the obligations resulting from provisional application that produced effects exclusively in the domestic sphere and those that produced effects at the international level. Nevertheless, it would be interesting to know why he had not considered the possibility of drawing a distinction between the rights created at the domestic level by the provisional application of treaties and those created at the international level earlier in the report. It was also unclear why the Special Rapporteur had presumed that article 70 of the 1969 Vienna Convention applied *mutatis mutandis* to the regime resulting from the termination of provisional application.

35. He looked forward to receiving answers on those matters in the Special Rapporteur's next report.

The meeting rose at 4.20 p.m.

3234th MEETING

Thursday, 31 July 2014, at 10 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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[287] See *Certain German Interests in Polish Upper Silesia,* p. 19.

Provisional application of treaties (*concluded*) (A/CN.4/666, Part II, sect. E, A/CN.4/675)

[Agenda item 8]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the Special Rapporteur on the provisional application of treaties to summarize the debate on his second report (A/CN.4/675).

2. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that the richness of the debates had confirmed the relevance of the topic. The Commission could provide considerable assistance to States by clarifying the scope of the legal effects produced by the provisional application of treaties. In order to do so, the Commission should, as pointed out by Sir Michael Wood, take a clear position that, subject to anything specific in the treaty, the rights and obligations of a State that had agreed to apply a treaty or part thereof provisionally were the same as if the treaty were in force. As most members appeared to agree, it followed that a breach of an obligation arising from the provisional application of a treaty entailed the international responsibility of the State. Mr. Forteau, referring to article 13 of the articles on responsibility of States for internationally wrongful acts,[288] had recalled that there was no breach of an obligation unless the State was "bound by the obligation in question at the time the act occurs", the objective of that provision being to codify non-retroactivity for the purpose of international responsibility. It was therefore the obligation that must be in force, and it would be, by virtue of the provisional application of the treaty, even if the treaty itself had not entered into force. Similarly, as pointed out by Mr. Šturma, citing article 12 of the same articles, a breach of an international obligation engaged the responsibility of the State "regardless of its origin or character". The term "origin" referred to all possible sources of international obligations, in other words all methods of creating legal obligations permitted under international law. In summary, clauses providing for the provisional application of a treaty produced legal effects and created obligations for a State, which would be internationally responsible if it failed to comply with them.

3. On the subject of methodology, he wished to point out that he had sought to list the various situations in which States had recourse to provisional application, but that the list was not intended to be exhaustive. His aim was to ensure that the issue, which had been somewhat neglected in the *travaux préparatoires* for the 1969 Vienna Convention and on which there was little in practice, doctrine and case law, was handled systematically. However, he would follow an inductive rather than a deductive approach, as recommended by Mr. Forteau and Sir Michael. Several members had stressed the relationship between article 25 of the 1969 Vienna Convention and other articles of that treaty, particularly between the provisional application of a treaty and the formulation of reservations. That issue would be examined in the third report. Another important point that had aroused considerable interest was provisional application through a unilateral act.

4. He acknowledged that a State could only unilaterally decide to provisionally apply a treaty in full or in part if the treaty in question provided for that possibility or if the States that had participated in negotiating the treaty had in some other manner so agreed, as noted in paragraph 33 of the second report. That said, even if the States that had negotiated the treaty had provided for the possibility of provisional application, legal obligations and effects arose only from the time when the provisional application clause had been negotiated and not when the State unilaterally decided to provisionally apply the treaty—except in cases involving two or more States. He referred to that time lag in his second report; it was therefore clear that provisional application must have been provided for by the negotiators or otherwise agreed in order for States to be able to unilaterally decide to provisionally apply a treaty.

5. However, situations that did not meet those strict criteria could arise in practice, one example being the accession of the Syrian Arab Republic to the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction. Of course, that case was an exception, as had rightly been pointed out by Ms. Jacobsson, but there was nothing to indicate that it would not happen again in the future, or that other similarly exceptional cases would not arise. Accordingly, a State that had not signed a treaty could decide to apply it provisionally even though the text contained no provision to that effect. Should the States parties to the treaty prevent that State from doing so? Should the depositary prevent such situations or intervene when they arose? In that regard, the analysis of unilateral declarations contained in the report was relevant. The Commission should recognize that exceptional situations could arise and that, in such cases, a lack of opposition and the agreement of the States parties to the provisionally applied treaty should be given considerable weight. For that reason, although the particular case of the Syrian Arab Republic had not been reflected in a draft guideline, the debate on the question of unilateral declarations was worthwhile. The Commission should also bear in mind that most multilateral treaties supported universality, and that States parties to such treaties generally looked favourably on their provisional application by States that were not parties to the treaty, because this reinforced the treaty. In any case, the Commission could consider the issue of the importance of consent in the context of such "agreement of the parties" or, as had been proposed by Mr. Forteau, the practice of depositaries.

6. The provisional application of treaties raised issues of domestic law and, clearly, issues of international law. The debates at the current and previous sessions had shown that members generally agreed that the Commission should refrain from doing a comparative analysis of States' domestic legislation. He agreed with Mr. Murphy that the provisional application of the Arms Trade Treaty gave rise to international obligations for the States concerned, in accordance with article 23 of the Treaty. He had simply wished to indicate in paragraph 58 of the second report that, given that national authorities had to

[288] General Assembly resolution 56/83 of 12 December 2001, annex. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

fulfil the obligations provided for under articles 6 and 7 in the domestic sphere, the specific consequences of the provisional application of that Treaty were primarily domestic. Other members had argued that the provisions of article 46, paragraph 1, of the 1969 Vienna Convention should not be overlooked; Mr. Kamto had stressed that the relationship between that article and article 27 of the Convention should be taken into account, and that the aspects of domestic law that had an impact at the international level should not be discarded at the outset. It was that very relationship that was addressed in paragraph 19 of the second report, and the aspects of domestic law relating to provisional application would be considered if they had an impact at the international level.

7. Lastly, with regard to future work on the topic, it was clear from the debate that it was necessary to examine the regime applicable to treaties concluded between States and international organizations and treaties concluded between international organizations, as well as the articles of the 1969 Vienna Convention of relevance to the provisional applications of treaties—not only those concerning termination of provisional application. For instance, Mr. Kamto had said that consideration should be given to the provisions of article 24, paragraph 4, which were applicable from the time of the adoption of the text and thus before any action related to provisional application. In conclusion, he said that he would endeavour to promptly prepare draft guidelines or conclusions, as recommended by some members.

Programme, procedures and working methods of the Commission and its documentation (*concluded*)*

[Agenda item 12]

Report of the Planning Group

8. Mr. MURASE (Chairperson of the Planning Group) said that the Group, which had held three meetings, had had before it section I (entitled "Other decisions and conclusions of the Commission") of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-eighth session (A/CN.4/666); General Assembly resolution 68/112 of 16 December 2013 on the report of the International Law Commission on the work of its sixty-fifth session; General Assembly resolution 68/116 of 16 December 2013 on the rule of law at the national and international levels; and the part of the proposed strategic framework for the period 2016–2017[289] covering "Programme 6: Legal affairs". The Working Group on the long-term programme of work, which had been reconstituted for the current session, had recommended including the topic of *jus cogens* in the long-term programme of work on the basis of the proposal prepared by Mr. Tladi. The Planning Group had endorsed that recommendation and had also recommended that the Commission request the Secretariat to draw up a list of possible topics together with brief explanatory notes on the basis of the general scheme of topics established in 1996.[290] The Commission might wish to examine the list, on the understanding that extensive syllabuses on the list of topics prepared by the Secretariat would be developed only once the Working Group on the long-term programme of work had drawn up a final list of topics, possibly in 2016. In the meantime, the Working Group would continue to consider any topics that the members might propose.

9. At the request of the General Assembly,[291] the Planning Group had drafted a chapter on the rule of law at the national and international levels. Lastly, he recommended that the sixty-seventh session of the Commission be held in Geneva from 4 May to 5 June and 6 July to 7 August 2015 and that the Commission examine several topics during the first part of the session, particularly the identification of customary international law and protection of the atmosphere.

10. Mr. KAMTO said that the Commission might wish to consider organizing a seminar on its work in 2017 to mark its seventieth anniversary.

11. After a discussion in which Mr. HASSOUNA, Mr. NIEHAUS, Mr. MURPHY, Mr. CANDIOTI, Mr. KAMTO, Mr. VALENCIA-OSPINA, Mr. PETRIČ, Mr. KITTICHAISAREE, Mr. AL-MARRI, Sir Michael WOOD and Ms. JACOBSSON took part, the CHAIRPERSON said he took it that the Commission wished to indicate in its annual report that some members would like part of the session to take place in New York. He also took it that the Commission wished to adopt the recommendations of the Planning Group for the inclusion of the topic of *jus cogens* in the long-term programme of work, to request the Secretariat to draw up a list of topics for consideration, and to take note of the report of the Planning Group (A/CN.4/L.849).

It was so decided.

The meeting rose at 11.25 a.m.

3235th MEETING

Monday, 4 August 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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* Resumed from the 3227th meeting.

[289] A/69/6 (Prog. 6).

[290] *Yearbook … 1996*, vol. II (Part Two), annex II, pp. 133–136.

[291] See General Assembly resolution 68/116 of 16 December 2013, para. 17.

Draft report of the Commission on the work of its sixty-sixth session

Chapter IV. *Expulsion of aliens* (A/CN.4/L.837 and Add.1/Rev.1)

1. The CHAIRPERSON invited the Commission to consider chapter IV of the draft report, beginning with the portion of the chapter contained in document A/CN.4/L.837.

A. Introduction

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 4 and 5

Paragraphs 4 and 5 were adopted.

Paragraph 6

2. The CHAIRPERSON said that the number and date of the current meeting would be entered into the appropriate blanks in the first sentence.

Paragraph 6 was adopted, subject to its completion by the Secretariat.

Paragraph 7

Paragraph 7 was adopted.

Section B was adopted.

C. Recommendation of the Commission

Paragraph 8

3. Mr. KAMTO (Special Rapporteur) said that the proposed text of the recommendation had been formulated to read:

"At its 3235th meeting, on 4 August 2014, the Commission decided, in accordance with article 23 of its statute, to recommend to the General Assembly: (*a*) to take note of the draft articles on the expulsion of aliens in a resolution, and to annex these articles to the resolution; (*b*) to recommend to States, when expelling aliens, to take appropriate measures to ensure that the rules set out in these articles are taken into account; (*c*) To consider, at a later stage, and in view of the importance of the topic, the elaboration of a convention on the basis of the draft articles." ["*A sa 3235*e *séance, le 4 août 2014, la Commission a décidé, conformément à l'article 23 de son statut, de recommander à l'Assemblé Générale :* a*) de prendre acte du projet d'articles sur l'expulsion des étrangers dans une résolution et d'annexer ces articles à la résolution;* b*) de recommander aux États de prendre des dispositions appropriées pour veiller à ce qu'il soit tenu compte des règles énoncées dans ces articles dans l'expulsion des étrangers;* c*) d'envisager à une date ultérieure et étant donné l'importance de la question, d'élaborer une convention sur la base du projet d'articles.*"]

4. Sir Michael WOOD proposed to leave the adoption of the recommendation until later in the session in order to afford members the necessary time to review it.

Paragraph 8 was left in abeyance.

D. Tribute to the Special Rapporteur

Paragraph 9

5. Mr. TLADI (Rapporteur) said that the proposed text of the resolution had been formulated to read:

"The International Law Commission, having adopted the draft articles on the expulsion of aliens, expresses to the Special Rapporteur, Mr. Maurice Kamto, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft articles through his tireless efforts and devoted work, and for the results achieved in the elaboration of draft articles on the expulsion of aliens."

The resolution was adopted by acclamation.

Paragraph 9 was adopted.

Section D was adopted.

E. Text of the draft articles on the expulsion of aliens

1. Text of the draft articles

Paragraph 10

Paragraph 10 was adopted, with an amendment to the Spanish version of article 15 in the text of the draft articles.

Section E.1 of chapter IV of the draft report of the Commission was adopted.

6. The CHAIRPERSON invited the Commission to consider the portion of chapter IV contained in document A/CN.4/L.837/Add.1/Rev.1.

2. Text of the draft articles and commentaries thereto

General commentary

Paragraph (1)

7. Mr. NOLTE proposed reformulating the final sentence so that it would read: "This is why some of the present draft articles constitute codification and others progressive development of fundamental rules on the expulsion of aliens." This would make it clear that not all draft articles constituted both the codification and the progressive development of such rules.

8. Mr. VÁZQUEZ-BERMÚDEZ said that Mr. Nolte's proposal failed to take into account the fact that some draft articles could, at once, involve both codification and progressive development. In his view, the current wording better reflected that fact.

9. Mr. TLADI said he supported the point made by Mr. Vázquez-Bermúdez. In the fourth sentence, he proposed that the word "issue" be replaced with "topic" or "subject", since classifying the expulsion of aliens as an "issue" could minimize its importance.

10. Mr. MURPHY endorsed Mr. Tladi's proposal to replace the word "issue" with "topic". He also endorsed the proposal made Mr. Vázquez-Bermúdez to retain the current wording of the final sentence.

11. Mr. CANDIOTI said that he shared the views of Mr. Murphy, Mr. Tladi and Mr. Vázquez-Bermúdez. The Commission was not in the habit of drawing a sharp distinction between codification and progressive development.

12. Mr. FORTEAU said that he concurred with Mr. Candioti. In addition, he proposed to insert the words "at least" (*au moins*) between the words "since" and "the nineteenth century" in the third sentence.

13. Ms. ESCOBAR HERNÁNDEZ said that she was in favour of retaining the current wording of the final sentence, since in those cases in which a particular provision reflected progressive development, the Special Rapporteur had so indicated in the commentary.

14. Sir Michael WOOD said that he supported Mr. Forteau's proposal to insert the words "at least" and Mr. Tladi's proposal to replace the term "issue" with "topic". In the fourth sentence, the word "numerous" was not an adequate translation of the French *plusieurs*, which would better be rendered by "several". In the sixth sentence, he proposed deleting the word "positive", in the phrase "the relevant positive law": the resulting phrase, "the relevant law", was sufficient to convey the intended meaning. In the final sentence, he proposed bringing the English text more closely into line with the French by replacing the word "constitute" with "involve", which would perhaps allay Mr. Nolte's concern.

15. Mr. KITTICHAISAREE said that he supported Sir Michael's proposal regarding the deletion of the word "positive". In the last sentence, he proposed replacing the word "constitute" with "comprise" instead of "involve".

16. Mr. NOLTE said that he would not insist on his proposal, in light of the comments just made. The question of whether the Commission was articulating existing law or suggesting progressive development of the law was perhaps not as relevant for the present topic as for other topics, but he wanted to draw the attention of the members to the fact that the necessity of drawing the distinction was being discussed in the literature.

17. The CHAIRPERSON said he took it that the Commission wished to adopt paragraph (1) with the following amendments: in the third sentence, the words "at least" should be inserted before "the nineteenth century"; in the fourth sentence, the word "issue" should be replaced by "topic"; in the sixth sentence, the word "positive" should be deleted; and in the final sentence, the word "constitute" should be replaced with "involve".

Paragraph (1) was adopted with those amendments.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

The general commentary as a whole, as amended, was adopted.

PART ONE. GENERAL PROVISIONS

Commentary to draft article 1 (Scope)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

18. Mr. VÁZQUEZ-BERMÚDEZ proposed that, in the Spanish version of the first footnote to the paragraph, the reference to *extranjeros ilegales* be replaced with *extranjeros en situación irregular* and that the sixth sentence, which read "This is the case with illegal or clandestine migrants" (*Tal es el caso de los migrantes ilegales o "clandestinos"*) be deleted, as it contained terms with pejorative connotations. He had already obtained the Special Rapporteur's agreement on that point.

19. Mr. NOLTE proposed that, in the English version of the first sentence of this footnote, the term "illegal alien" be replaced with "alien unlawfully present", which would be analogous to the wording used in the International Covenant on Civil and Political Rights. In the eighth sentence of the same footnote, the words "illegal status" should be replaced with "irregular status".

20. Mr. SABOIA said that he supported the proposals made by Mr. Vázquez-Bermúdez and by Mr. Nolte.

Those proposals were adopted.

21. Mr. PETRIČ proposed that, in the penultimate sentence of paragraph (3), the word "necessary" be inserted between the words "draw" and "distinctions", and in the final sentence, the word "be", between the words "should" and "also", be deleted.

The proposal was adopted.

Paragraph (3), as amended, was adopted.

Paragraph (4)

22. Mr. FORTEAU said that, in the final sentence, the phrase "and exempting them from the normal expulsion procedure" (*et qui les mettent ainsi à l'abri de la procédure ordinaire d'expulsion*) should be deleted. Contrary to that statement, a diplomat who had been declared *persona non grata* and who did not leave the country as required by the rules of international law governing diplomatic relations would be subject to the normal expulsion procedure.

23. Mr. KITTICHAISAREE said that he had no objection to Mr. Forteau's proposal and drew attention to two minor editorial corrections that needed to be made in the second sentence.

Paragraph (4), as amended, was adopted.

Paragraph (5)

24. Sir Michael WOOD proposed that, in the interests of readability, the first sentence of the last footnote to the paragraph be deleted.

25. Mr. CANDIOTI said that, if that sentence were to be deleted, the French and Spanish versions of the current second sentence would have to be rephrased for the sake of clarity.

26. Ms. ESCOBAR HERNÁNDEZ proposed that the beginning of the footnote in question read "If a displaced person is by force of circumstances in a foreign territory, outside his or her State of origin or nationality, he or she would be in a situation comparable to that of a refugee." ["*Si una persona desplazada se encuentra por la fuerza de las circunstancias, en territorio extranjero fuera de un Estado de origen o de nacionalidad, esa persona se halla en una situación comparable a la del refugiado.*"]

Paragraph (5), as amended and with an amendment made to the above-mentioned footnote by Ms. Escobar Hernández, was adopted.

The commentary to draft article 1 as a whole, as amended, was adopted.

Commentary to draft article 2 (Use of terms)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

27. Mr. MURPHY, supported by Mr. FORTEAU, said that the description of disguised expulsion provided in paragraph (2) did not quite capture the definition thereof given in draft article 10 and the commentary thereto. In particular, the idea of the intentionality behind disguised expulsion contained in draft article 10 was not reflected in paragraph (2). In his view, the text would be made clearer if a cross reference to draft article 10 were included and any unnecessary duplication removed. He therefore proposed deleting the final sentence of paragraph (2) and the final two sentences of the footnote to the paragraph. He further proposed that the third sentence of the footnote be reworded to read: "One should also consider that expulsion occurs even in the absence of a formal legal act, as discussed in the commentary to draft article 10."

28. He pointed out the need for an editorial correction in the English text of draft article 2 (*a*).

29. Mr. VÁZQUEZ-BERMÚDEZ said that the use of the word "unilateral" in the first sentence of the footnote did not reflect the wording of the definition set forth in the draft article itself and might cause confusion. He therefore proposed reformulating that sentence to read: "In the domestic law of most States, expulsion is a formal act by the State, taking the form of an administrative act, since it is a decision of the administrative authorities."

30. Sir Michael WOOD supported the proposals made by Mr. Murphy and Mr. Vázquez-Bermúdez. The assertion contained in the second sentence of this footnote to the effect that each stage of the expulsion process could be contested was inaccurate. Accordingly, in that sentence, the phrase "each stage of which can be contested" should be deleted.

31. Mr. NOLTE said that it should be borne in mind that in many legal systems, a distinction was made between the formal act of expulsion, which was an administrative act subject to review, and direct action by a representative of a State, such as when a police officer physically forced an alien to leave the country. It might be argued that the use of force by a police officer was necessarily and always a formal act, but that would be to confuse the concept of formal act with the concept of official act, which was much wider. He therefore proposed that the fifth sentence of paragraph (2) be split in two, to read: "Means of expulsion that do not take the form of a formal act are also included in the definition of expulsion within the meaning of the draft articles. They may fall under the regime of prohibition of 'disguised expulsion' set out in draft article 10." The amendment would ensure that paragraph (2) was not read as articulating only two alternatives—the formal act and the indirect disguised expulsion—but as leaving room for a third alternative, namely simple and direct force without pretence of formality. He further proposed that the beginning of the second sentence of paragraph (2) be reformulated to read: "The definition reflects the distinction between, on the one hand, a formal act by which a State orders and thereby compels an alien to leave its territory …".

32. Mr. MURPHY endorsed Mr. Nolte's proposals.

Paragraph (2), as amended by Mr. Murphy and Mr. Nolte, was adopted, with the amendments to the above-mentioned footnote by Mr. Murphy, Mr. Vázquez-Bermúdez and Sir Michael Wood.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

33. Sir Michael WOOD said that the fourth and fifth sentences of the English version did not appear in the French text and should be deleted.

34. Mr. NOLTE said it was his understanding that the Commission had agreed that the duty to protect an alien in the situations envisaged in the paragraph was an obligation of conduct and not an obligation of result. He therefore proposed that, for the sake of clarity, the word "appropriately" be added after the word "protect" in the second sentence.

35. Mr. MURPHY supported the proposals made by Sir Michael and Mr. Nolte. With regard to the second footnote to the paragraph, he said that the final sentence did not seem to fit in with the rest of the footnote and was somewhat confusing. He therefore proposed its deletion.

36. Mr. KAMTO (Special Rapporteur) said he had no problem with Sir Michael's proposal to align the English text with the French. As to the final sentence of the footnote in question, he did not quite understand Mr. Murphy's concern, since, in his view, that sentence was useful in describing the element of constraint that existed during the execution of expulsion orders.

37. Mr. FORTEAU, supported by Mr. SABOIA, supported the deletion of the final sentence in the above-mentioned footnote and proposed the insertion of a

third sentence, which would read: "The formal measure ordering the expulsion is an injunction, and hence a legal constraint, while the act of expulsion itself is actual or physical constraint, experienced as such." ["*La mesure formelle ordonnant l'expulsion est une injonction, donc une contrainte légale tandis que l'exécution de l'opération d'expulsion est une contrainte de fait ou physique ressentie comme telle.*"]

38. Mr. PETRIČ said that he could accept the amendments proposed by Mr. Murphy, Mr. Nolte and Sir Michael.

39. Mr. MURPHY said that he was attracted by the wording proposed by Mr. Forteau, if the idea was that the execution or implementation of an expulsion order was preceded by a formal measure ordering expulsion, which was an injunction.

40. Mr. KAMTO (Special Rapporteur) expressed his agreement with the amendments to the text of the commentary and to the footnote in question thereto.

Paragraph (4), as amended by Mr. Nolte and Sir Michael Wood and with the amendments to the second footnote to the paragraph proposed by Mr. Murphy and Mr. Forteau, was adopted.

Paragraph (5)

41. Mr. MURPHY proposed that, in the first sentence, the word "transfer" be replaced with the word "surrender". He suggested that the penultimate sentence read: "Moreover, the exclusion of matters relating to non-admission from the scope of the draft articles is without prejudice to the rules relating to refugees." In the final sentence, the words "sets forth" should be replaced with "references". Those changes reflected an attempt to bring the commentary into line with draft article 6.

42. Mr. NOLTE proposed the replacement of the word "other" in the second sentence with "some", because the use of "other" gave the impression that a different legal system had been described previously, which was not the case.

43. Mr. TLADI suggested that the phrase "in cases where an alien is refused entry" be added at the end of the second sentence, in order to highlight the fact that, in some circumstances, "non-admission" was used in preference to *refoulement* in the draft articles.

44. Mr. KAMTO (Special Rapporteur) agreed to the amendments proposed by Mr. Murphy, Mr. Nolte and Mr. Tladi, subject to the insertion of the words "of international law" after the phrase "without prejudice to the rules" in the penultimate sentence.

Paragraph (5), as amended by Mr. Kamto, Mr. Murphy, Mr. Nolte and Mr. Tladi, was adopted.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

The commentary to draft article 2 as a whole, as amended, was adopted.

Commentary to draft article 3 (Right of expulsion)

Paragraph (1)

45. Mr. FORTEAU proposed the deletion of the word "natural" in the third sentence.

46. Ms. ESCOBAR HERNÁNDEZ suggested that the adjective "natural" instead be replaced with "inherent".

47. Sir Michael WOOD supported the latter proposal and suggested that in order to render the sentence less emphatic, the phrase should read: "an inherent right of the State flowing from its sovereignty". He further suggested the deletion of the words "the legal" at the end of the second sentence.

48. Mr. VÁZQUEZ-BERMÚDEZ and Mr. NOLTE endorsed the amendments proposed by Ms. Escobar Hernández and Sir Michael.

49. Mr. PETRIČ said that he was in favour of the amendment proposed by Ms. Escobar Hernández.

50. Mr. KAMTO (Special Rapporteur) said that every author had his own style. He did not, however, intend to do battle over stylistic questions.

Paragraph (1), as amended by Ms. Escobar Hernández and Sir Michael Wood, was adopted.

The meeting rose at 1 p.m.

3236th MEETING

Monday, 4 August 2014, at 3.05 p.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the Commission on the work of its sixty-sixth session (*continued*)

Chapter IV. *Expulsion of aliens* (*continued*) (A/CN.4/L.837 and Add.1/Rev.1)

E. Text of the draft articles on the expulsion of aliens (*continued*)

2. Text of the draft articles and commentaries thereto (*continued*)

1. The CHAIRPERSON invited the members of the Commission to resume their consideration, paragraph by paragraph, of document A/CN.4/L.837/Add.1/Rev.1.

Commentary to draft article 3 (Right of expulsion) (*concluded*)

Paragraph (2)

2. Mr. FORTEAU said that in the French version, for the sake of clarity, the phrase *le droit positif au sens du droit conventionnel*, in the second sentence, should be replaced with *le droit international en vigueur*.

That proposal was adopted.

3. Mr. TLADI proposed that the fourth sentence ("Some of the rules contained therein are established by certain treaty regimes …"), which he deemed to be redundant, be deleted, and that the last sentence be recast to read: "Draft article 3 therefore preserves the inherent right of the State to expel aliens in accordance with international law."

4. Sir Michael WOOD said he thought that the fourth sentence should be retained, but that the English version should be aligned with the French, to read: "Some of the rules contained therein are … firmly established in customary international law, although some of them constitute …". He also proposed that the wording of the International Covenant on Civil and Political Rights be reproduced in the last half of the penultimate sentence, which would then read: "derogations are possible in certain emergency situations, for example, where there is a public emergency threatening the life of the nation".

Those proposals were adopted.

5. Mr. FORTEAU, referring to the final sentence of paragraph (2), said it was important to retain the notion that derogations from the draft articles were possible, because the draft article itself did not contain a clause making express provision therefor.

6. Sir Michael WOOD proposed that the scope of such derogations be clarified by amending the final sentence to read: "Draft article 3 thus preserves the possibility for a State to adopt measures that derogate from certain requirements of the present draft articles insofar as that is permitted under other instruments."

7. Mr. VÁZQUEZ-BERMÚDEZ, supported by Mr. PETRIČ and Ms. ESCOBAR HERNÁNDEZ, said that the expression "other instruments" proposed by Sir Michael was too vague and that it would be preferable to maintain the reference to the State's other obligations arising from international law that was contained in the current wording.

8. Sir Michael WOOD said that his proposal could be amended to read "in so far as that is consistent with its other obligations under international law".

That proposal was adopted.

Paragraph (2) was adopted, subject to the requisite corrections pursuant to the amendments just made.

The commentary to draft article 3, as amended, was adopted.

Commentary to draft article 4 (Requirement for conformity with law)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

9. Mr. NOLTE proposed the addition, in the first sentence, of the phrase "in accordance with the law" after "The requirement that an expulsion decision must be made".

That proposal was adopted.

10. Mr. NOLTE, noting that expulsions carried out without a formal decision were not necessarily disguised expulsions within the meaning of draft article 10, because they could also stem directly from a State's conduct, proposed that the second sentence be amended to take account of that fact.

11. Mr. FORTEAU said that such an amendment would be at odds with the purpose of the commentary, which was to explain the dual requirement of adoption of an expulsion decision, on the one hand, and of its conformity with the law, on the other. Mr. Nolte's concern could, however, be met by deleting the adjective "formal" before "decision" in the first sentence, which would also ensure consistency with draft article 26, paragraph 1 (*a*), regarding the alien's right to receive notice of the expulsion decision, and by deleting the second sentence, which would then have become meaningless.

12. Mr. MURPHY and Mr. NOLTE endorsed Mr. Forteau's proposals.

13. Mr. KAMTO (Special Rapporteur) said that he failed to see how the deletion of the adjective "formal" in the first sentence would render the second sentence meaningless, for the latter referred to situations where expulsion stemmed from conduct and where there was therefore no decision of which an alien might need to be notified. He was, however, prepared to accept that proposal for the sake of consensus. On the other hand, the second sentence absolutely had to be retained in order to make it plain that, although draft article 4 concerned only situations where expulsion followed a decision taken in accordance with the law, the Commission realized that expulsions could occur without any formal procedure.

14. Mr. MURPHY said that the second sentence was still problematic in that it suggested that any action resulting in expulsion that had not formed the subject of a formal decision constituted disguised expulsion, whereas that was not the definition that the Commission had adopted in draft article 10. In order to avoid any risk of confusion, he proposed to retain two separate sentences, but that the second be reworded to read: "The prohibition of any form of disguised expulsion is contained in draft article 10, paragraph 1."

That proposal was adopted.

Paragraph (2) was adopted, subject to the requisite corrections pursuant to the amendments just made.

Paragraph (3)

15. Sir Michael WOOD proposed that the first sentence be amended to read: "The requirement of conformity with the law follows logically from the fact that expulsion is to be exercised within the framework of law."

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (7)

Paragraphs (4) to (7) were adopted.

The commentary to draft article 4, as amended, was adopted.

Commentary to draft article 5 (Grounds for expulsion)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

16. Mr. TLADI proposed replacing "appears to be" with "is" in the second sentence.

Paragraph (2), as amended, was adopted.

Paragraph (3)

17. Sir Michael WOOD said that the last sentence should be modified, because there were many valid grounds for expulsion. National security and public order should not therefore be singled out as if they were the only two grounds for expulsion established expressly in positive international law.

Paragraph (3), as amended and with two drafting changes in the English version, was adopted.

Paragraph (4)

18. Mr. NOLTE proposed the insertion of the words "where relevant" between "taken into consideration" and "by the expelling State" in the penultimate sentence.

Paragraph (4), as amended, was adopted.

Paragraph (5)

19. Mr. KITTICHAISAREE proposed that, for the sake of clarity, the end of the first sentence in the English version be amended to read: "contrary to the expelling State's obligations under international law".

Paragraph (5), as amended, was adopted.

The commentary to draft article 5, as amended, was adopted.

Part Two. Cases of prohibited expulsion

Commentary to draft article 6 (Prohibition of the expulsion of refugees)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

20. Mr. FORTEAU drew attention to the fact that the first and last footnotes to the paragraph referred to different definitions of the notion of "refugee" and proposed, for the sake of consistency, to delete from the last footnote the long definition of the term "refugee" taken from article 1 of the OAU [Organization of African Unity] Convention governing the specific aspects of refugee problems in Africa.

That proposal was adopted.

21. Mr. KITTICHAISAREE said that in the English version, the words "Office of the" should be inserted before "United Nations High Commission for Refugees", because one could not speak of the practice of a person, only of that of an institution.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (5)

Paragraphs (3) to (5) were adopted.

Paragraph (6)

22. Mr. MURPHY proposed replacing the verb "extends" with "may extend" in the first sentence and deleting the sixth sentence, which was confusing.

23. Mr. KAMTO said that he was sceptical of the merits of that proposal. The replacement of "extends" with "may extend" would be tantamount to turning a rule deriving from practice into a mere option open to States.

24. Mr. FORTEAU welcomed Mr. Murphy's proposal. Since draft article 6 set forth a "without prejudice" clause, it was vital not to be overly prescriptive in the commentary. He suggested that "likewise extends" be replaced by the more neutral "has also been extended".

That proposal was adopted.

Paragraph (6), as amended, was adopted.

Paragraph (7)

25. Mr. MURPHY proposed that in the second sentence, the phrase "does cover that situation as well" be replaced with "provides that these draft articles are without prejudice to that situation as well". In the third sentence, he also proposed replacing "provided for" with "mentioned in".

Paragraph (7), as amended, was adopted.

The commentary to draft article 6, as amended, was adopted.

Commentary to draft article 7 (Rules relating to the expulsion of stateless persons)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to draft article 7 was adopted.

Commentary to draft article 8 (Deprivation of nationality for the purpose of expulsion)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to draft article 8 was adopted.

Commentary to draft article 9 (Prohibition of collective expulsion)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

26. Sir Michael WOOD proposed that the second sentence, which referred to the special case of migrant workers, be either deleted or moved to the end of the paragraph.

27. Mr. KITTICHAISAREE said that it would be preferable to delete the second sentence, because the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families was only one of several treaties prohibiting collective expulsion.

That proposal was adopted.

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

28. Mr. MURPHY proposed the insertion of "rights and" between "the" and "obligations" in the second sentence.

Paragraph (5), thus amended, was adopted.

The commentary to draft article 9, as amended, was adopted.

Commentary to draft article 10 (Prohibition of disguised expulsion)

Paragraph (1)

29. Mr. FORTEAU, advancing the same reasons as those given with regard to draft article 2, proposed the deletion of the adjective "formal" in the first and second sentences.

That proposal was adopted.

30. Following a discussion in which Mr. FORTEAU, Mr. KITTICHAISAREE and Mr. KAMTO (Special Rapporteur) took part, Mr. VÁZQUEZ-BERMÚDEZ proposed the deletion of the phrase "as the term might carry an undesirable positive connotation".

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (5)

Paragraphs (2) to (5) were adopted.

Paragraph (6)

Paragraph (6) was adopted with a minor drafting change in the English version.

Paragraph (7)

Paragraph (7) was adopted.

The commentary to draft article 10, as amended, was adopted.

Commentary to draft article 11 (Prohibition of expulsion for purposes of confiscation of assets)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

31. Following a discussion concerning the scope of the French term *sanction*, the Spanish term *sanción* and the English term "penalty" in which Mr. FORTEAU, Mr. KAMTO (Special Rapporteur), Ms. ESCOBAR HERNÁNDEZ, Mr. PETRIČ, Mr. NOLTE and Sir Michael WOOD took part, Mr. FORTEAU proposed the addition of the phrase "consistent with law" (*conformément à la loi*), after "as a penalty", in the last sentence of the paragraph.

Paragraph (2), as amended, was adopted.

The commentary to draft article 11, as amended, was adopted.

Commentary to draft article 12 (Prohibition of resort to expulsion in order to circumvent an ongoing extradition procedure)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

32. Mr. MURPHY, supported by Mr. VÁZQUEZ-BERMÚDEZ and Mr. FORTEAU, proposed that "In any event" at the beginning of the last sentence be replaced with "Where the sole purpose is not to circumvent an extradition procedure".

Paragraph (2), as amended and with a minor drafting change in the English version, was adopted.

The commentary to draft article 12, as amended, was adopted.

PART THREE. PROTECTION OF THE RIGHTS OF ALIENS SUBJECT TO EXPULSION

CHAPTER I. *General provisions*

Commentary to draft article 13 (Obligation to respect the human dignity and human rights of aliens subject to expulsion)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

33. Mr. SABOIA, supported by Mr. FORTEAU, said that the notion of dignity was subjective and raised a thorny issue. He therefore proposed the deletion of the last part of the last sentence, after "inherent in every human being".

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

The commentary to draft article 13, as amended, was adopted.

Commentary to draft article 14 (Prohibition of discrimination)

Paragraph (1)

34. Mr. MURPHY proposed the replacement, in the first sentence, of the phrase "the obligation not to discriminate" with the words "the obligation to respect rights without discrimination".

Paragraph (1), as amended, was adopted.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

Paragraph (4)

35. Mr. NOLTE said that the verbs should be in the present tense in the English version.

36. Mr. VÁZQUEZ-BERMÚDEZ, Mr. SABOIA and Sir Michael WOOD were of the opinion that it was necessary to simplify paragraph (4), as it was too long and complicated.

37. The CHAIRPERSON asked Mr. Vázquez-Bermúdez to draft a proposal for the following meeting.

Paragraph (4) was left in abeyance.

The meeting rose at 6 p.m.

3237th MEETING

Tuesday, 5 August 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the Commission on the work of its sixty-sixth session (*continued*)

Chapter IV. *Expulsion of aliens* (*continued*) (A/CN.4/L.837 and Add.1/Rev.1)

E. Text of the draft articles on the expulsion of aliens (*continued*)

2. Text of the draft articles and commentaries thereto (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of chapter IV of the draft report and drew attention to the portion of the chapter contained in document A/CN.4/L.837/Add.1/Rev.1.

Commentary to draft article 14 (Prohibition of discrimination) (*continued*)

Paragraphs (5) and (6)

2. Mr. NOLTE said that, in the context of possible exceptions to the obligation not to discriminate based on nationality, reference was made, in the second sentence of paragraph (5), to "associations of States such as the European Union". That raised the question of the compatibility of the regime of freedom of movement established by the European Union with the principle of non-discrimination. The second sentence of paragraph (6) was clearer in that regard, since it stated that, under the draft article, States retained the possibility to establish special legal regimes based on the principle of freedom of movement of citizens. Therefore, and in order to avoid unnecessary repetition, he proposed that the second sentence of paragraph (5) be deleted and that paragraph (5) be merged with paragraph (6).

3. Mr. FORTEAU supported Mr. Nolte's proposal. If that proposal were accepted, the words *Dès lors*, in the first sentence of the French text of paragraph (6), should be deleted.

4. Sir Michael WOOD agreed with the suggestions just made. In order to give authority to the proposition, it might be useful to add a footnote referring to the ruling of the European Court of Human Rights in *Moustaquim* v. *Belgium*.

5. Mr. SABOIA said that, if the first sentence of paragraph (5) were simply merged with paragraph (6), the Commission might appear to be singling out nationality as a permissible basis for discrimination, which would be incompatible with the general prohibition of discrimination on grounds of nationality. It would be helpful if a different formulation could be found.

6. Mr. FORTEAU proposed that paragraph (5) be deleted and that the beginning of the second sentence of paragraph (6) read: "On the other hand, it also preserves the possible exceptions to the obligation not to discriminate based on nationality and, in particular, the possibility for States to establish amongst themselves special regimes …" ["*D'autre part, elle préserve les possibles exceptions à l'obligation de non-discrimination qui seraient fondées sur la nationalité et, en particulier, la possibilité pour des États d'établir entre eux des régimes juridiques spéciaux* …"].

7. Sir Michael WOOD suggested replacing the word "nationality" with the expression "national origin", which was used in all the human rights instruments.

8. Mr. MURPHY agreed with that proposal. He suggested that the sentence proposed by Mr. Forteau be amended accordingly and, for sake of readability, be split in two, so that it would read: "On the other hand, it also preserves the possible exceptions to the obligation not to discriminate based on national origin. In particular, it preserves the possibility for States to establish among themselves special legal regimes based on the principle of freedom of movement for their citizens such as the regime of the European Union."

9. The CHAIRPERSON said that he took it that the Commission wished to delete paragraph (5) and adopt paragraph (6) as amended by Mr. Forteau and Mr. Murphy.

It was so decided.

Paragraph (6), as amended, was adopted.

Commentary to draft article 15 (Vulnerable persons)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to draft article 15 was adopted.

Chapter II. Protection required in the expelling State

Commentary to draft article 16 (Obligation to protect the right to life of an alien subject to expulsion)

10. Mr. FORTEAU suggested that the order of citation of instruments in the last footnote of the commentary to draft article 16 and the first footnote of paragraph (1) of the commentary to draft article 17 should be varied so as to avoid systematically citing the European Convention on Human Rights first, before the human rights instruments of other regions.

11. Mr. TLADI proposed the deletion of the final sentence of the commentary to draft article 16, since there was no connection between the right to life and the provision of health services free of charge.

12. Mr. KAMTO (Special Rapporteur) said that when an issue was mentioned in the commentary, it was often in response to specific points raised by States in their comments. The Commission should keep that in mind when deciding whether to delete a given sentence.

13. After a discussion in which Mr. KITTICHAISAREE, Sir Michael WOOD, Mr. SABOIA, Mr. MURPHY and Mr. HMOUD took part, the CHAIRPERSON said that he took it that the Commission wished to delete the final sentence of the commentary.

It was so decided.

The commentary to article 16 as a whole, as amended, was adopted.

Commentary to draft article 17 (Prohibition of torture or cruel, inhuman or degrading treatment or punishment)

Paragraph (1)

14. Mr. MURPHY proposed that the final sentence of paragraph (1) of the commentary to draft article 24, which cited the *Lori Berenson-Mejía* v. *Peru* case of the Inter-American Court of Human Rights, be moved to the end of paragraph (1) of the commentary to draft article 17, since the subject matter of the case was more directly relevant to draft article 17 than to draft article 24.

15. Mr. SABOIA said that he agreed with Mr. Murphy's proposal, but that the mention of *Lori Berenson-Mejía* v. *Peru* in the commentary to draft article 17 should not preclude a reference to that case in the commentary to draft article 24.

16. Mr. KAMTO (Special Rapporteur) said that he was not entirely in favour of moving the final sentence of paragraph (1) of the commentary to draft article 24 to the paragraph under consideration. The reason for the inclusion of the reference to *Lori Berenson-Mejía* v. *Peru* in the commentary to draft article 24 was to show that there was a trend in international jurisprudence towards an approach that did not make a distinction between torture, on the one hand, and cruel, inhuman or degrading treatment or punishment, on the other. The absence of any citation of the judgment in that case in the commentary to draft article 24 would undermine the Commission's arguments in favour of broadening the scope of the protection afforded by article 3 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment so as to cover not only torture, but also other cruel, inhuman or degrading treatment or punishment. He proposed that a footnote be inserted in paragraph (1) of the commentary to draft article 17 referring readers to the citation in paragraph (1) of the commentary to draft article 24.

17. Mr. KITTICHAISAREE said that he agreed with Mr. Murphy's proposal, since the inclusion of a citation from the *Lori Berenson-Mejía* v. *Peru* case would complement the reference in paragraph (1) to the *Ahmadou Sadio Diallo* case, which dealt specifically with the prohibition of inhuman or degrading treatment. However, that did not prevent the Commission from also referring to *Lori Berenson-Mejía* v. *Peru* in the commentary to draft article 24.

18. Mr. KAMTO (Special Rapporteur) said that he wished to place on record the fact that in draft article 24, the Commission had chosen to adopt a broad approach and to include within the scope of the article situations in which there were substantial grounds for believing that an alien subject to expulsion would be subjected to cruel, inhuman or degrading treatment or punishment. It was therefore important, in the commentary to draft article 24, to demonstrate the basis in international law for that choice, and it was with that in mind that he wished to cite *Lori Berenson-Mejía* v. *Peru*.

19. The CHAIRPERSON said that he took it that the Commission wished to include a reference in the last footnote to paragraph (1) of the commentary to draft article 17 directing readers to paragraph (1) of the commentary to draft article 24.

It was so decided.

Paragraph (2)

20. Sir Michael WOOD said the wording of the reference to draft article 24 in the second sentence did not reflect the wording of either the title or the text of that article. He therefore proposed that the sentence be amended to read: "On the other hand, the obligation not to expel an alien to a State where he or she may be subjected to such treatment or punishment is set out in draft article 24 below."

Paragraph (2), as amended, was adopted.

Paragraph (3)

21. Mr. PARK said that the reference to "relevant monitoring bodies" in the final sentence was imprecise. Since the commentary to draft article 24 mentioned an international body, the Committee against Torture, he suggested that the phrase in question read: "relevant international monitoring bodies" (*organes internationaux compétents de contrôle*).

Paragraph (3), as amended, was adopted.

The commentary to draft article 17 as a whole, as amended, was adopted.

Commentary to draft article 18 (Obligation to respect the right to family life)

Paragraph (1)

22. Sir Michael WOOD, noting that the national legislation mentioned in the footnote had been passed prior to the drafting of the Secretariat memorandum,[292] suggested that the list of legislation be replaced with a reference to the relevant paragraphs or pages of the memorandum. The Commission would not then be purporting to provide a comprehensive or up-to-date list of the legislation of many different countries.

23. After a discussion in which Mr. ŠTURMA, Mr. FORTEAU, Ms. ESCOBAR HERNÁNDEZ, Ms. JACOBSSON and Mr. NOLTE participated, Mr. KAMTO (Special Rapporteur) said that the references to national legislation should be retained. Although the Secretariat memorandum could be consulted on the Commission's website, hard copies were not available in bookshops or libraries, which meant that it was not universally accessible. The footnote should therefore provide up-to-date examples of national legislation, supplemented with a reference to the Secretariat memorandum.

Paragraph (1) was adopted, subject to that amendment to the footnote.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

Paragraph (4)

24. Sir Michael WOOD said that, in the first sentence, the term "obligation" would be more apposite than the word "need".

Paragraph (4), as amended, was adopted.

Paragraph (5)

25. Mr. NOLTE proposed that, in the first sentence, the term "case law" be transposed in order to replace the word "rules", used earlier in the same sentence, as courts did not establish rules, but decided cases.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

The commentary to draft article 18 as a whole, as amended, was adopted.

Commentary to draft article 19 (Detention of an alien for the purpose of expulsion)

Paragraphs (1) to (8)

Paragraphs (1) to (8) were adopted.

Paragraph (9)

26. Sir Michael WOOD drew attention to the fact that a sentence had been omitted in the English version. The missing sentence, which was the second sentence in the French text, should read: "The implementation of this principle is without prejudice to the right of the expelling State to apply to the alien subject to expulsion its criminal law on offences committed by that person."

Paragraph (9) was adopted with that correction to the English text.

The commentary to draft article 19 as a whole, as amended, was adopted.

Commentary to draft article 20 (Protection of the property of an alien subject to expulsion)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

27. Mr. FORTEAU said that the phrase "before leaving the territory of that State" (*avant de quitter le territoire dudit État*) did not appear in the resolution adopted by the Institute of International Law in 1892.[293] It should therefore be deleted.

28. Mr. KAMTO (Special Rapporteur) said that it was only logical that a person who was subject to expulsion would have to settle his or her affairs before leaving the territory of the expelling State. However, if Mr. Forteau wished to keep closely to the wording of the resolution in question, he would have no objection to the deletion of the phrase.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were adopted.

The commentary to draft article 20 as a whole, as amended, was adopted.

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[292] Document A/CN.4/565 and Corr.1, mimeographed; available from the Commission's website, documents of the fifty-eighth session (2006). The final text will be reproduced in an addendum to *Yearbook … 2006*, vol. II (Part One).

[293] "Règles internationales sur l'admission et l'expulsion des étrangers", resolution of the Institute of International Law, adopted on 9 September 1892, in H. Wehberg (ed.), *Tableau général des résolutions (1873–1956)*, Basel, Éditions juridiques et sociologiques, 1957, p. 51 *et seq.*

CHAPTER III. *Protection in relation to the State of destination*

Commentary to draft article 21 (Departure to the State of destination)

Paragraph (1)

29. Mr. NOLTE proposed the deletion of the words "in general" in the first sentence.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (6)

Paragraphs (2) to (6) were adopted.

The commentary to draft article 21 as a whole, as amended, was adopted.

Commentary to draft article 22 (State of destination of aliens subject to expulsion)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to draft article 22 was adopted.

Commentary to draft article 23 (Obligation not to expel an alien to a State where his or her life would be threatened)

30. Sir Michael WOOD said that in paragraph 2 of the draft article itself, the English and French texts diverged. The French text spoke of a State that did not *apply* the death penalty (*n'applique pas*), whereas the English text spoke of a State that did not *have* the death penalty.

31. Ms. ESCOBAR HERNÁNDEZ and the CHAIRPERSON, speaking as a member of the Commission, confirmed that the same was true of the Spanish and Russian versions of the text.

32. Mr. TLADI (Rapporteur) asked the Chairperson of the Drafting Committee to recapitulate the lengthy discussion of that draft article.

33. Mr. SABOIA (Chairperson of the Drafting Committee) said that draft paragraph 2 concerned the specific prohibition of expelling an alien to a State of destination where his or her life would be threatened by the imposition or execution of the death penalty, unless an assurance had previously been obtained that the death penalty would not be imposed or, if already imposed, would not be carried out. It covered both States that had never had, or had abolished, the death penalty, and States that non longer applied it. The language of paragraph 2 had been refined in order to make it correspond to the standard set in the case law that had inspired it. The new wording indicated that an expelling State that did not have the death penalty must not expel an alien to a State where he or she had been sentenced to the death penalty, or where there was a real risk that he or she would receive that sentence.

34. The CHAIRPERSON said that he took it that the Commission wished to align the English, Spanish and Russian versions on the French text of draft article 23.

It was so decided.

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to draft article 23 was adopted.

Commentary to draft article 24 (Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment)

Paragraph (1)

35. Mr. FORTEAU said that in the second sentence, the term *non-refoulement* should be replaced with "non-expulsion".

36. Mr. KAMTO (Special Rapporteur) said that the full text of paragraph 100 of the decision of the Inter-American Court of Human Rights in the case of *Lori Berenson-Mejía* v. *Peru* should be inserted at the end of that paragraph.

37. Sir Michael WOOD, supported by Mr. Forteau, queried the third sentence, which described the Committee against Torture as having "also taken [a] restrictive approach". The Committee against Torture merely applied article 3 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, which prohibited expulsion to States where there was a danger of torture. It did not extend that prohibition to cover expulsion to States where there was a danger of cruel, inhuman or degrading treatment or punishment. He therefore suggested the deletion of the third sentence.

Paragraph (1), as amended, was adopted.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

Paragraph (4)

38. Mr. NOLTE said that, in the penultimate section of that paragraph, the phrase "the said provision may also cover cases" would be a more accurate reflection of the wording of the decision of the European Court of Human Rights quoted immediately thereafter.

39. Mr. FORTEAU said that the French version would then read *pouvait aussi trouver à s'appliquer*.

Paragraph (4), as amended, was adopted.

The commentary to draft article 24 as a whole, as amended, was adopted.

CHAPTER IV. PROTECTION IN THE TRANSIT STATE

Commentary to draft article 25 (Protection in the transit State of the human rights of an alien subject to expulsion)

The commentary to draft article 25 was adopted.

PART FOUR. SPECIFIC PROCEDURAL RULES

Commentary to draft article 26 (Procedural rights of aliens subject to expulsion)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

40. Mr. NOLTE suggested that, in the reference to article 1 of Protocol No. 7 to the "Convention for the Protection of Human Rights and Fundamental Freedoms", the title be altered to the "European Convention on Human Rights", in line with the Commission's usual practice.

Paragraph (5), as amended, was adopted.

Paragraphs (6) to (10)

Paragraphs (6) to (10) were adopted.

Paragraph (11)

41. Mr. NOLTE suggested that, in the penultimate sentence of the English version of the text, the word "specified", before the phrase "minimum period of time", be deleted.

42. Mr. KAMTO (Special Rapporteur) agreed with that suggestion. The French text conveyed the correct sense and other language versions should be aligned with it.

On that understanding, paragraph (11) was adopted.

The commentary to draft article 26 as a whole, as amended, was adopted.

Commentary to draft article 27 (Suspensive effect of an appeal against an expulsion decision)

Paragraphs (1) and (2)

43. Mr. NOLTE, noting that draft article 27 was *lex ferenda*, questioned whether "recognition" was an appropriate term in that context, as it presupposed that something already existed in law. He suggested that, in the first sentence of paragraph (2), it be altered to "formulation". He also suggested some minor editorial amendments to paragraphs (1) and (2).

44. Mr. KAMTO (Special Rapporteur) expressed support for the suggestion to replace references to "recognition" with another term. In French, it would be best rendered with the verb *énoncer*.

On that understanding, paragraphs (1) and (2) were adopted.

Paragraph (3)

45. Ms. ESCOBAR HERNÁNDEZ requested the inclusion of a sentence at the end of the last footnote to the paragraph to indicate that the arguments referred to in paragraph (3) of the commentary had been restated by the European Court of Human Rights on 22 April 2014 in its judgment in the case of *A. C. and Others* v. *Spain*.

Paragraph (3), as amended, was adopted, subject to the inclusion of a sentence as proposed by Ms. Escobar Hernández.

Paragraph (4)

Paragraph (4) was adopted.

The commentary to draft article 27 as a whole, as amended, was adopted.

Commentary to draft article 28 (International procedures for individual recourse)

The commentary to draft article 28 was adopted.

Part Five. Legal consequences of expulsion

Commentary to draft article 29 (Readmission to the expelling State)

Paragraph (1)

46. Mr. NOLTE, reiterating the concern that he had expressed with regard to the commentary to draft article 27, suggested that paragraph (1) be amended to reflect that concern by replacing "recognizes" in the first sentence with a different verb and deleting "recognition of" in the second sentence.

47. Mr. KAMTO (Special Rapporteur) agreed with Mr. Nolte's first suggested amendment, but not with his second. The second sentence of paragraph (1) did not state the Commission's views; rather, it referred to domestic legislation. As such, it was appropriate to refer to the fact that a particular right was recognized.

48. Mr. NOLTE pointed out that the sentence in question referred to the treatment of the right not only in domestic legislation, but also at the international level. He doubted whether a simple recommendation by the Inter-American Commission on Human Rights, cited in the last footnote to the paragraph, could be taken as recognizing a general right.

49. Mr. VÁZQUEZ-BERMÚDEZ said that, in accordance with its statute, the Inter-American Commission could make only recommendations. The use of the term "recommend" in the passage cited in that footnote was standard phrasing and said nothing about the relative importance of its content.

50. Mr. NOLTE suggested that the words "recognition of" in the second sentence of paragraph (1) be left unaltered, but that the phrase "and even at the international level" be changed to read "and contemplated even at the international level".

51. Mr. KAMTO (Special Rapporteur) said that the word "contemplated" (*envisagée*) did not fit the context. Several international human rights bodies, including the Human Rights Council and the African Commission on Human and Peoples' Rights, issued findings that were termed "recommendations", but with which States were nonetheless expected to comply. The Commission was at risk of denying the international reality by unduly weakening the paragraph in question. While he agreed with the suggested change to the first sentence, the rest of the paragraph should be left unaltered.

52. Mr. TLADI expressed support for the Special Rapporteur's view. Paragraph (1) already contained a number of qualifiers and nothing should be added to dilute it further.

53. Mr. SABOIA, echoing Mr. Tladi's comments, endorsed the point made by Mr. Vázquez-Bermúdez. The Inter-American Commission was entitled to refer cases of non-compliance with its recommendations to the

Inter-American Court of Human Rights, which showed that its competence lay somewhere between that of a purely declaratory body and a judicial body.

54. Mr. MURPHY agreed with Mr. Nolte. The Inter-American Commission had no judicial function with respect to States that were not parties to the American Convention on Human Rights: "Pact of San José, Costa Rica", or were not covered by the jurisdiction of the Inter-American Court. While acknowledging Mr. Tladi's point, he suggested that the text would present a fairer picture of the Inter-American Commission's recommendation if the word "contemplated" were inserted in paragraph (1), as suggested by Mr. Nolte, and the words "in effect recognized the existence of this right" and "in that it" were deleted from the last footnote to the paragraph.

55. Mr. VÁZQUEZ-BERMÚDEZ, expressing support for the views of the Special Rapporteur, said that, while a few States had not become parties to the American Convention on Human Rights: "Pact of San José, Costa Rica", many more had. The Inter-American Court, created under the Charter of the Organization of American States, dealt with all OAS States. Although the Inter-American Commission technically issued "recommendations", many countries recognized them as binding.

56. Sir Michael WOOD suggested that deleting the words "recognition of" from paragraph (1) but leaving the footnote in question unchanged might strike a fair balance among the views expressed. He also suggested a minor editorial amendment to the English version of paragraph (1).

57. Mr. KAMTO (Special Rapporteur) said that it was impossible to reflect all the views expressed during the discussion; the words "may be discerned" in paragraph (1) were sufficient to allay the various concerns expressed.

58. Mr. SABOIA agreed with the Special Rapporteur and expressed support for Sir Michael's suggestions.

59. The CHAIRPERSON took it that the Commission agreed to amend paragraph (1) as suggested by Sir Michael, but to leave the second footnote to the paragraph unaltered.

On that understanding, paragraph (1), as amended, was adopted.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

Paragraph (4)

60. Mr. NOLTE suggested that, in the first sentence, the word "recognized" be altered to reflect the agreement reached on the wording of paragraph (1) of the commentary to draft article 29.

61. Sir Michael WOOD proposed that the phrase "is recognized" be changed to "applies".

Paragraph (4), as thus amended, was adopted.

Paragraph (5)

62. Mr. NOLTE suggested that the phrase "a previous determination" be changed to "a previous binding determination", in line with paragraph (4) of the commentary to draft article 29.

Paragraph (5), as amended, was adopted.

Paragraph (6)

63. Mr. FORTEAU said that, in the fourth sentence of the French version of the text, the words *mais qui s'est révélée illicite* should be inserted after *préalablement adoptée*.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

The commentary to draft article 29 as a whole, as amended, was adopted.

Commentary to draft article 30 (Responsibility of States in cases of unlawful expulsion)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

64. Mr. NOLTE reiterated his view that, even if findings of the Inter-American Commission on Human Rights were assumed to be binding, those referred to in paragraph (3) did not purport to formulate any general right; rather, they were recommendations that a particular person be readmitted to a State in particular circumstances. Interpreting them to imply recognition of a right of readmission would be going too far.

Paragraph (3) was adopted.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were adopted.

The commentary to draft article 30 was adopted.

Commentary to draft article 31 (Diplomatic protection)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The commentary to draft article 31 was adopted.

65. Mr. CANDIOTI said that it would be useful to include a preamble to the text of the draft articles, as the Commission had often done previously. It should be user-friendly and resemble the preambles found in treaties, covering the objectives and basic principles of the project. The Special Rapporteur had already drafted a text, which should be circulated for discussion.

66. Mr. KAMTO (Special Rapporteur), echoing the views expressed by Mr. Candioti, confirmed that a draft preamble had been submitted to the Secretariat at the end of the first part of the Commission's session.

67. The CHAIRPERSON said that the draft preamble would be circulated for discussion at another meeting.

The meeting rose at 1 p.m.

3238th MEETING

Tuesday, 5 August 2014, at 3.05 p.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the Commission on the work of its sixty-sixth session (*continued*)

Chapter IV. *Expulsion of aliens* (*concluded*) (A/CN.4/L.837 and Add.1/Rev.1)

E. Text of the draft articles on the expulsion of aliens (*concluded*)

2. Text of the draft articles and commentaries thereto (*concluded*)

1. The CHAIRPERSON invited the members of the Commission to pursue their consideration of document A/CN.4/L.837/Add.1/Rev.1, which contained the text of the draft articles on expulsion of aliens and the commentaries thereto.

Commentary to draft article 14 (Prohibition of discrimination) (*concluded*)

Paragraph (4)

2. Mr. VÁZQUEZ-BERMÚDEZ proposed that paragraph (4) be reformulated to read:

> "With regard to the prohibition of any discrimination on the ground of sexual orientation, differences remain and in certain regions the practice varies. In any case, there is international practice and case law on this matter.[footnote] It should be noted that the interpretation by the Human Rights Committee of the reference to 'sex' in articles 2, paragraph 1, and 26 of the International Covenant on Civil and Political Rights was that the notion includes sexual orientation."

3. Mr. MURPHY, noting that the third sentence in paragraph (4) was virtually identical to the first sentence in the footnote to the paragraph, proposed that the latter be moved to the end of paragraph (4) and that the footnote should begin with "*Communication No. 488/1992, Nicholas Toonen* v. *Australia*".

Paragraph (4), as amended, was adopted.

The commentary to draft article 14, as a whole, as amended, was adopted.

Section E.2, as a whole, as amended, was adopted.

Section E of chapter IV of the report of the Commission, as a whole, as amended, was adopted.

C. Recommendation of the Commission (*concluded*)[*]

Paragraph 8 (*concluded*)

4. The CHAIRPERSON invited the Special Rapporteur to read out his proposal for paragraph 8, contained in document A/CN.4/L.837, which had been left in abeyance.

5. Mr. KAMTO (Special Rapporteur) said that the paragraph would read:

> "At its … meeting, on … August 2014, the Commission decided, in accordance with article 23 of its statute, to recommend to the General Assembly:
>
> "(*a*) to take note of the draft articles on the expulsion of aliens in a resolution, to annex the articles to the resolution, and to encourage their widest possible dissemination;
>
> "(*b*) to consider, at a later stage, the elaboration of a convention on the basis of the draft articles."

Paragraph 8 was adopted.

Section C of chapter IV of the report of the Commission was adopted.

Chapter IV of the report of the Commission, as a whole, as amended, was adopted.

6. The CHAIRPERSON said that the preamble to the draft articles (document without a symbol, distributed in the meeting room) would be considered at a later meeting so that the members had time to peruse it.

7. Mr. KAMTO (Special Rapporteur) said that he was pleased that, after several years of sustained effort on a subject which had initially appeared unpromising, the Commission had been able to draw up a set of well-balanced draft articles largely based on current law and on cautious, measured, progressive development. Now that the fate of the draft articles was in the hands of States, he wished to express his sincere gratitude to the Secretariat, the successive Secretaries to the Commission and its past and current members, especially Mr. Candioti, Mr. Comissário Afonso, Mr. Valencia-Ospina, Sir Michael Wood and Mr. Alain Pellet.

Chapter V. *Protection of persons in the event of disasters* (A/CN.4/L.838 and Add.1)

8. The CHAIRPERSON invited the members of the Commission to take up the consideration of document A/CN.4/L.838.

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[*] Resumed from the 3235th meeting.

A. Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 3 to 7

Paragraphs 3 to 7 were adopted.

Paragraph 8

9. Mr. FORTEAU pointed out that the first sentence of the French version referred to *organisations internationales concernées* whereas paragraph 3 of document A/CN.4/L.835 spoke of the *organisations internationales compétentes.*

10. Mr. VALENCIA-OSPINA (Special Rapporteur) said that the term "competent" was used in the English version and proposed that *concernées* be replaced with *compétentes.*

Paragraph 8, with that amendment to the French version, was adopted.

Paragraph 9

11. Mr. KITTICHAISAREE said that there was a mistake in the English version: "2009" should read "2014".

Paragraph 9, with that correction to the English version, was adopted.

Section B, as amended, was adopted.

C. Text of the draft articles on the protection of persons in the event of disasters adopted by the Commission on first reading

1. Text of the draft articles

Paragraph 10

12. Mr. FORTEAU proposed the addition of the phrase "with full respect for their rights" after "disasters" in draft article 1 (Scope) in order to align its wording on that of draft article 2.

Paragraph 10, as amended, was adopted.

Section C.1, as a whole, as amended, was adopted.

13. The CHAIRPERSON invited the members of the Commission to consider document A/CN.4/L.838/Add.1, paragraph by paragraph.

2. Text of the draft articles with commentaries thereto

Commentary to draft article 1 [1] (Scope)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to draft article 1 [1] was adopted.

Commentary to draft article 2 [2] (Purpose)

Paragraph (1)

14. Mr. CAFLISCH proposed that the second sentence be recast to read: "While it is not always the case that the draft articles prepared by the Commission include a provision outlining the objectives, it is not unprecedented" ["*Si les projets d'articles établis par la Commission ne comprennent pas tous une disposition qui en énonce les objectifs, le cas s'est déjà présenté*"].

Paragraph (1), as amended, was adopted.

Paragraph (2)

15. Mr. TLADI proposed that, in order to avoid any confusion, the word "individuals" in the last sentence of the English version be replaced with "persons".

Paragraph (2), with that amendment to the English version, was adopted.

Paragraphs (3) to (8)

Paragraphs (3) to (8) were adopted.

Paragraph (9)

16. Mr. NOLTE proposed that the last two sentences be amended to read: "It is understood that there is often an implied degree of latitude in the application of rights, conditioned by the extent of the impact of the disaster, depending on the relevant rules recognizing or establishing the rights in question."

Paragraph (9), as amended, was adopted.

Paragraph (10)

Paragraph (10) was adopted.

The commentary to draft article 2 [2], as amended, was adopted.

Commentary to draft article 3 [3] (Definition of disaster)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

17. Mr. NOLTE said that he was rather dissatisfied with the wording of the second sentence, which seemed like "officialese".

18. Sir Michael WOOD, supported by Mr. VALENCIA-OSPINA (Special Rapporteur), Mr. TLADI and Mr. SABOIA, proposed the deletion of the word "isolated" between "serves to exclude" and "events".

Paragraph (5), as amended, was adopted.

Paragraphs (6) to (9)

Paragraphs (6) to (9) were adopted.

The commentary to draft article 3 [3], as amended, was adopted.

Commentary to draft article 4 (Use of terms)

Paragraph (1)

19. Mr. NOLTE proposed the deletion, at the end of the paragraph, of the phrase "both of which are terms of art". After a discussion in which Sir Michael WOOD, Mr. PETRIČ, Mr. VALENCIA-OSPINA (Special Rapporteur), Mr. FORTEAU and Mr. TLADI took part, it was decided to simply delete the last sentence in the paragraph.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted, subject to an editorial amendment to the footnote*, which should read "Footnote 3 above …".*

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

20. Mr. NOLTE proposed that, at the end of the first sentence, the phrase "control over that territory" be replaced with "control regarding the same territory", in order to clarify its meaning.

Paragraph (4), as amended, was adopted.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

Paragraph (7)

21. Mr. MURPHY proposed the deletion of the paragraph, which set out definitions that were unnecessary.

Paragraph (7) was deleted, on the understanding that the numbering of subsequent paragraphs would be amended accordingly.

Paragraph (8)

Paragraph (8) was adopted.

Paragraph (9)

22. Mr. FORTEAU proposed the amendment of the last sentence, the French version of which contained some redundant prepositions, so that it would read: "In other words, a State offering assistance is not an 'assisting State', with the various legal consequences that flow from such categorization, as provided for in the draft articles, until such assistance has been consented to by the affected State, in accordance with draft article 14 [11]" ["*Autrement dit, un État offrant son assistance ne devient un 'État prêtant assistance', avec les diverses conséquences juridiques qui découlent de cette qualification selon le projet d'articles, que lorsque l'État affecté a consenti à cette assistance, conformément au projet d'article 14 [11]*"].

Paragraph (9), as amended, was adopted.

Paragraphs (10) and (11)

Paragraphs (10) and (11) were adopted.

Paragraph (12)

23. Sir Michael WOOD proposed that, in the second sentence, the word "person" be replaced with "individual".

Paragraph (12), as amended, was adopted.

Paragraphs (13) to (24)

Paragraphs (13) to (24) were adopted.

The commentary to draft article 4, as amended, was adopted.

Commentary to draft article 5 [7] (Human dignity)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

Paragraph (6)

24. Mr. NOLTE proposed that in the phrase in the third sentence that read "obligation to take action to maintain human dignity", the verb "maintain" be replaced with the verb "protect". In the fourth sentence, he proposed replacing the phrase "the duty of protection" with "the duty to protect".

Paragraph (6), as amended, was adopted.

The commentary to draft article 5 [7], as amended, was adopted.

Commentary to draft article 6 [8] (Human rights)

Paragraph (1)

25. Mr. NOLTE said that perhaps it might be advisable to modify the second sentence in order to make it quite clear that the obligation to protect rights was incumbent not only on States but also on all organizations, including NGOs.

26. Mr. HMOUD commented that it would be simpler just to delete that sentence.

Paragraph (1), as amended, was adopted.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

Paragraph (4)

27. Mr. MURPHY proposed the deletion of the phrase "in the context of disasters" at the end of the first sentence of the English version.

Paragraph (4), with that amendment to the English version, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

The commentary to draft article 6 [8], as amended, was adopted.

Commentary to draft article 7 [6] (Humanitarian principles)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

Paragraph (7)

28. In response to a comment from Mr. Forteau, Sir Michael WOOD proposed that the third sentence be recast in order to read: "For this reason, the neutral expression 'vulnerable' was preferred to either 'vulnerable groups' or 'vulnerable persons'."

Paragraph (7), as amended, was adopted.

The commentary to draft article 7 [6], as amended, was adopted.

Commentary to draft article (8) [5] (Duty to cooperate)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

29. Sir Michael WOOD, pointing out that the phrase "the imperative of", in the sentence following the quotation from General Assembly resolution 46/182 of 19 December 1991, did not appear in the French version, proposed its deletion.

That proposal was adopted.

30. Sir Michael WOOD further proposed that, in the sentence beginning "Moreover, the cooperation imperative", the words "the cooperation imperative" should be replaced with "the obligation to cooperate".

31. Mr. FORTEAU commented that it would be preferable to speak of the "duty to cooperate", in accordance with the title of the draft article.

Paragraph (3), with that amendment to the English version, was adopted.

Paragraph (4)

32. Sir Michael WOOD proposed that, in the first sentence, the words "the prerogatives" be replaced with the "the primary role", which was the expression used in paragraph 2 of draft article 12 (Role of the affected State). He also suggested the deletion of the word "primary" before "duty" in the second sentence.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

33. Mr. TLADI proposed that in the last sentence of the English version, the bracketed phrase "(including those such rules to be added to the draft articles in the future)" be deleted.

Paragraph (6), with that correction to the English version, was adopted.

Paragraph (7)

34. Mr. KITTICHAISAREE proposed the deletion of the second sentence, which suggested that the mandate of ICRC was restricted to situations of armed conflict. That was incorrect, and it failed to take account of the fact that very often, ICRC was denied authorization to take action in the field by the States affected by an armed conflict.

35. After a discussion in which Mr. FORTEAU, Mr. SABOIA, Mr. VALENCIA-OSPINA (Special Rapporteur), Mr. PARK and Mr. KITTICHAISAREE took part, the CHAIRPERSON, noting that apart from Mr. Kittichaisaree, all the members were in favour of retaining the second sentence as it stood, proposed that paragraph (7) be adopted without amendment.

Paragraph (7) was adopted.

The commentary to draft article 8 [5], as amended, was adopted.

Commentary to draft article 9 [5 bis*]* (Forms of cooperation)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

36. Mr. CAFLISCH proposed the replacement of the word "loosely" (*plus ou moins*) in the first sentence with "partially" (*partiellement*).

That proposal was adopted.

37. Ms. ESCOBAR HERNÁNDEZ drew attention to a lack of consistency between paragraph (1), which indicated that draft article 9 [5 *bis*] sought to elaborate further the meaning of draft article 8 [5] "without creating any additional legal obligations", and the first sentence in paragraph (2), which stated that draft article 9 [5 *bis*] was based on the second sentence of paragraph 4 of article 17 of the articles on the law of transboundary aquifers,[294] "which expands upon the general obligation to cooperate". She suggested that in the final part of the first sentence of paragraph (2), the verb "expands" be replaced with a different word.

38. Mr. VALENCIA-OSPINA (Special Rapporteur) proposed that it be replaced with the verb "explains".

That proposal was retained.

Paragraph (2) was adopted, subject to editorial amendments to be made in accordance with the proposals adopted.

Paragraphs (3) to (8)

Paragraphs (3) to (8) were adopted.

The commentary to draft article 9 [5 bis*], as amended, was adopted.*

[294] See the draft articles on the law of transboundary aquifers adopted by the Commission at its sixtieth session and the commentaries thereto in *Yearbook … 2008*, vol. II (Part Two), pp. 19 *et seq.*, paras. 53–54. See also General Assembly resolution 63/124 of 11 December 2008, annex.

Commentary to draft article 10 [5 ter] (Cooperation for disaster risk reduction)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to draft article 10 [5 ter] was adopted.

Commentary to draft article 11 [16] (Duty to reduce the risk of disasters)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

Paragraph (6)

39. Mr. FORTEAU proposed the deletion of the phrase *de manière uniforme* in the second sentence of the French version.

40. Mr. VALENCIA-OSPINA (Special Rapporteur) said that this phrase was probably a mistranslation of the term "evenly spread" in the English version which referred, not to the uniformity of specific prevention policies, but to their homogeneous distribution among the 64 States or regions which had adopted such policies on all continents throughout the world.

Paragraph (6) was adopted subject to a correction to the French version.

Paragraph (7)

41. Mr. FORTEAU proposed the replacement of "rules of general applicability adopted thus far" with "rules of general applicability in the present draft articles".

Paragraph (7), as amended, was adopted.

Paragraphs (8) and (9)

Paragraphs (8) and (9) were adopted.

Paragraph (10)

42. Mr. MURPHY said that the Hyogo Declaration[295] was not particularly recent, since it had been adopted in 2005, and it would be preferable to replace the words "most recently" with another expression.

43. Mr. VALENCIA-OSPINA (Special Rapporteur) proposed that the phrase be replaced with "notably".

Paragraph (10), as amended, was adopted.

Paragraph (11)

44. Sir Michael WOOD said that, in the antepenultimate sentence of the paragraph, the reference should be to paragraph (9) of the commentary, and not to paragraph (8).

Paragraph (11), as amended, was adopted.

Paragraphs (12) and (13)

Paragraphs (12) and (13) were adopted.

Paragraph (14)

Paragraph (14) was adopted, with a minor editorial correction to the English version.

Paragraphs (15) to (18)

Paragraphs (15) to (18) were adopted.

Paragraph (19)

Paragraph (19) was adopted with a minor editorial correction to the English version.

45. The CHAIRPERSON said that, in view of the lateness of the hour, the Commission would pursue its consideration of document A/CN.4/L.838/Add.1 at the following meeting.

The meeting rose at 6 p.m.

3239th MEETING

Wednesday, 6 August 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the Commission on the work of its sixty-sixth session (*continued*)

Chapter V. *Protection of persons in the event of disasters* (*concluded*) (A/CN.4/L.838 and Add.1)

1. The CHAIRPERSON invited the Commission to pursue its consideration of chapter V of the draft report and to resume its discussion of the portion contained in document A/CN.4/L.838/Add.1.

C. Text of the draft articles on the protection of persons in the event of disasters adopted by the Commission on first reading (*concluded*)

2. Text of the draft articles with commentaries thereto (*concluded*)

Commentary to draft article 11 [16] (Duty to reduce the risk of disasters) (*concluded*)

Paragraphs (20) to (22)

Paragraphs (20) to (22) were adopted.

Paragraph (23)

2. In response to a question by Sir Michael WOOD, Mr. VALENCIA-OSPINA (Special Rapporteur) said that paragraph (11) of the commentary related to paragraph 1 of the draft article. The reference to paragraph 2 should therefore be deleted.

[295] Report of the World Conference on Disaster Reduction, held at Kobe, Hyogo (Japan) from 18 to 22 January 2005 (A/CONF.206/6), chap. I, Resolution 1.

Paragraph (23), as amended, was adopted.

The commentary to draft article 11 [16] as a whole, as amended, was adopted.

Commentary to draft article 12 [9] (Role of the affected State)

Paragraph (1)

3. Mr. MURPHY proposed the addition of the word "to" before "provide" and of the words "and assistance" after "disaster relief" in order to be consistent with the text of draft article 12.

4. Mr. FORTEAU proposed the deletion of the phrase "As a whole" in the beginning of the fourth sentence.

Paragraph (1), as amended by Mr. Murphy and Mr. Forteau, was adopted.

Paragraphs (2) to (6)

Paragraphs (2) to (6) were adopted.

The commentary to draft article 12 [9] as a whole, as amended, was adopted.

Commentary to draft article 13 [10] (Duty of the affected State to seek external assistance)

Paragraph (1)

5. Mr. NOLTE proposed the deletion of the final sentence, as its contents were reflected in paragraph (3). He also proposed the inversion of paragraphs (2) and (3), so that paragraph (3) became the logical extension of the final sentence of paragraph (1).

6. Mr. TLADI (Rapporteur) said that, in order to make the commentary more concise, he proposed the deletion of paragraph (3) and the inclusion, at the end of the final sentence in paragraph (1), of the phrase "since in the view of these members, international law as it currently stands does not recognize such a duty". The phrase was taken from paragraph (3) and sufficed to indicate that members of the Commission disagreed about the existence of a duty to seek assistance.

7. Mr. WISNUMURTI said that he opposed Mr. Nolte's proposal to delete the final sentence of paragraph (1). The statement made in that sentence was important and it should be retained as it stood.

8. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he had not been in favour of the inclusion of the final sentence in paragraph (1) and of paragraph (3) in the first place. He could nevertheless agree to Mr. Tladi's suggestion to add a phrase to the final sentence and to delete paragraph (3).

Paragraph (1), as amended by Mr. Tladi, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

Paragraph (3) was deleted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

9. Mr. NOLTE proposed the addition of the word "also" before "derives", in the first sentence, to make it plain that State sovereignty was another source of the duty to protect.

10. Mr. VALENCIA-OSPINA (Special Rapporteur) agreed to the amendment, since it would emphasize the two sources of that duty, a State's sovereignty and its obligations.

Paragraph (5), as amended, was adopted.

Paragraph (6)

11. Mr. NOLTE suggested the insertion, in the first sentence of the second section of the paragraph, of the words "members of" before "the international community".

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (11)

Paragraphs (7) to (11) were adopted.

The commentary to draft article 13 [10] as a whole, as amended, was adopted.

Commentary to draft article 14 [11] (Consent of the affected State to external assistance)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

12. Mr. TLADI (Rapporteur) said that, in order to properly reflect the views of all the members, the third sentence should be revised to read: "On the other hand, some members of the Commission were of the view that the duty not to arbitrarily withhold consent was not recognized in international law." The final sentence should be deleted.

13. Mr. VALENCIA-OSPINA (Special Rapporteur) said that, although the Commission had taken the position that the draft article should be couched in mandatory language so that it was the potential basis for a binding international instrument, Mr. Tladi's suggestion had the merit of covering the positions expressed by past and present members of the Commission.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (10)

Paragraphs (4) to (10) were adopted.

The commentary to draft article 14 [11] as a whole, as amended, was adopted.

Commentary to draft article 15 [13] (Conditions on the provision of external assistance)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

14. Sir Michael WOOD proposed the replacement of the phrase "previous and subsequent" in the last sentence with the word "the".

Paragraph (3), as amended, was adopted.

Paragraph (4)

15. Sir Michael WOOD suggested that the second sentence be recast to read: "It does not, however, imply the prior existence of national law addressing the specific conditions imposed by an affected State in the event of a disaster."

16. Mr. NOLTE proposed the insertion of the words "internal law" in brackets after the words "national law" in the first sentence. That would make it clear that, although the 1969 Vienna Convention and the articles on responsibility of States for internationally wrongful acts[296] referred to internal law, in the context of the topic under consideration, the Commission had decided that it was better to refer to national law.

Paragraph (4), as amended by Sir Michael Wood and Mr. Nolte, was adopted.

Paragraph (5)

17. Mr. MURPHY proposed the addition, at the end of the first sentence, of the phrase "of the affected State".

18. Sir Michael WOOD suggested that, in the fourth sentence, the word "assertion" be replaced with "affirmation".

Paragraph (5), as amended by Mr. Murphy and Sir Michael Wood, was adopted.

Paragraphs (6) to (11)

Paragraphs (6) to (11) were adopted.

The commentary to draft article 15 [13] as a whole, as amended, was adopted.

Commentary to draft article 16 [12] (Offers of external assistance)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

19. Mr. NOLTE proposed the deletion of the last sentence of paragraph (2). It cited a different draft article than the one to which it related and raised questions about how a State making an offer of external assistance could know whether it would be unacceptable to the affected State.

20. Mr. VALENCIA-OSPINA (Special Rapporteur) said that the sentence had been intended to maintain the fragile equilibrium achieved throughout the commentary. Essentially, States should not make offers that were subject to conditions that, *prima facie*, would be deemed unacceptable by receiving States. In particular, such offers should be non-discriminatory: for example, an offer that specifically denied assistance to the inhabitants of an area under the control of an insurrectionist movement might rightly be refused.

21. Mr. SABOIA welcomed the clarification provided by the Special Rapporteur. The sentence reflected a corollary of the principle of neutrality and should be retained.

22. Mr. MURPHY, acknowledging Mr. Nolte's point that the sentence included text from a draft article other than that to which it related, suggested that it be replaced with the following: "Among other things, such offers shall be made consistent with the principles set forth in draft article 7."

23. Mr. VALENCIA-OSPINA (Special Rapporteur) said that referring only to draft article 7 would exclude other relevant principles.

24. Mr. TLADI, supported by Mr. FORTEAU, echoed Mr. Murphy's comments. The sentence referred specifically to offers of assistance, which States were at liberty to refuse.

25. Mr. PARK expressed support for the views of the Special Rapporteur and Mr. Saboia.

26. Mr. NOLTE, endorsing the points made by Mr. Murphy, Mr. Tladi and others, said that the sentence must at least be redrafted to avoid conflating the issues of conditional offers and conditional acceptance.

27. Mr. VALENCIA-OSPINA (Special Rapporteur) agreed with the amendment proposed by Mr. Murphy.

28. Mr. SABOIA said that, in light of the Special Rapporteur's statement, he could agree to amend the sentence; however, in order to avoid referring exclusively to draft article 7, he suggested that it should read: "Among other things, such offers shall be made consistent with the principles set forth in these draft articles, in particular draft article 7."

Paragraph (2), as amended by Mr. Murphy and Mr. Saboia, was adopted.

Paragraphs (3) to (5)

Paragraphs (3) to (5) were adopted.

The commentary to draft article 16 [12] as a whole, as amended, was adopted.

Commentary to draft article 17 [14] (Facilitation of external assistance)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

The commentary to draft article 17 [14] was adopted.

[296] General Assembly resolution 56/83 of 12 December 2001, annex. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

Commentary to draft article 18 (Protection of relief personnel, equipment and goods)

Paragraphs (1) to (8)

Paragraphs (1) to (8) were adopted.

Paragraph (9)

29. Sir Michael WOOD, supported by Mr. VALENCIA-OSPINA (Special Rapporteur), said that mandatory language should be avoided in the commentary to the draft articles. The phrase "shall be considered" in the last sentence of paragraph (9) should accordingly be amended to read "should be considered".

Paragraph (9), as amended, was adopted.

Paragraphs (10) to (13)

Paragraphs (10) to (13) were adopted.

The commentary to draft article 18 as a whole, as amended, was adopted.

Commentary to draft article 19 [15] (Termination of external assistance)

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to draft article 19 [15] was adopted.

Commentary to draft article 20 (Relationship to special or other rules of international law)

Paragraph (1)

30. Mr. MURPHY suggested that "(a)" and "(b)" be replaced with "either" and "or", respectively.

Paragraph (1), as amended, was adopted.

Paragraph (2)

31. Mr. MURPHY suggested that, in the first sentence, the words "('special' rules)" be inserted after "first part of the provision", to contrast with the reference to "other rules" in paragraph (5) of the commentary to the same draft article.

32. Sir Michael WOOD said that it might be clearer to amend the first part of the sentence to read: "The rationale behind the reference to 'special' rules is". If so, a corresponding change should be made in paragraph (5).

33. Mr. VALENCIA-OSPINA (Special Rapporteur) expressed support for Sir Michael's suggestion.

Paragraph (2), as amended by Sir Michael Wood, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

34. The CHAIRPERSON suggested that, as previously proposed by Sir Michael, the beginning of the paragraph be amended to read: "The reference to 'other rules' deals with".

35. Mr. NOLTE, agreeing with the Chairperson's suggestion, proposed that the entire section of text in parentheses be recast as a separate sentence, to begin: "Examples would be provisions concerning the law of treaties".

36. Sir Michael WOOD further suggested that, in the new sentence proposed by Mr. Nolte, the word "the" be deleted before "supervening impossibility of performance" and "fundamental change of circumstances", and the word "both" be deleted before "States and international organizations".

Paragraph (5), as amended, was adopted.

Paragraph (6)

37. Mr. TLADI suggested that, in the third sentence, "customary international rules" be changed to "rules of customary international law".

38. Sir Michael WOOD suggested that the beginning of the paragraph be altered to read: "The 'without prejudice' clause in draft article 20".

39. Mr. NOLTE said that, in order to make the paragraph more general, the words "In this respect", should be deleted from the beginning of the fourth sentence.

40. Mr. MURPHY, agreeing to all the suggestions made, proposed that the word "also" be inserted between "draft article 20" and "applies" in the first sentence.

With those amendments, paragraph (6) was adopted.

Paragraph (7)

41. Sir Michael WOOD said that, as in paragraph (6), the phrase "the preservation mechanism enshrined in draft article 20" should be altered to "the 'without prejudice' clause in draft article 20".

42. Mr. KITTICHAISAREE suggested that, in the second sentence, "the rules of international law" should be changed to "all rules of international law", so as to encompass more than just the customary international law and treaty law mentioned in paragraphs (6) and (7) of the commentary and to mirror the language used later in the sentence.

43. Mr. NOLTE, referring to the same sentence, suggested that the words "could be applied" should be changed to "applies".

44. Mr. VALENCIA-OSPINA (Special Rapporteur) agreed to those suggestions.

Paragraph (7), as thus amended, was adopted.

The commentary to draft article 20 as a whole, as amended, was adopted.

Commentary to draft article 21 [4] (Relationship to international humanitarian law)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

45. Sir Michael WOOD, referring to the first sentence of paragraph (2), said that, in the phrase "the applicability of the draft articles over armed conflict", the word "over" should be altered for stylistic reasons; however, in view of the subtlety of the paragraph, exactly how to amend it should be discussed.

46. Mr. VALENCIA-OSPINA (Special Rapporteur), acknowledging that concern, said that there was always a risk of a text being misinterpreted, but that the intention of the paragraph was clear: the potential applicability of the draft articles to situations of armed conflict was not excluded. He suggested changing "over" to "in a situation of".

47. Mr. HMOUD suggested "during" as an alternative.

48. Sir Michael WOOD, emphasizing the importance of the paragraph, said that the text of the draft article had been the product of long deliberation. The commentary should be as clear as possible.

49. Mr. VALENCIA-OSPINA (Special Rapporteur), supported by Mr. SABOIA, recalled that the draft article had been adopted early in the Commission's work on the topic but had been moved to the end of the text, immediately after a new draft article on the relationship of the draft articles to special or other rules of international law. For the purposes of the Commission's first reading of the text, he suggested that "over" be changed to "in situations of", on the understanding that the Commission would consider the matter again on second reading, paying particular attention to the links between draft articles 20 and 21.

Paragraph (2), as amended by the Special Rapporteur, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

The commentary to draft article 21 [4] as a whole, as amended, was adopted.

The commentaries to the draft articles on protection of persons in the event of a disaster, as a whole, as amended, were adopted.

Chapter V of the report of the Commission, as a whole, as amended, was adopted.

Chapter VII. *Subsequent agreements and subsequent practice in relation to the interpretation of treaties* (A/CN.4/L.840 and Add.1–3)

50. The CHAIRPERSON invited the Commission to consider chapter VII of its draft report, beginning with the text contained in document A/CN.4/L.840.

A. Introduction

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 5 to 9

Paragraphs 5 to 9 were adopted.

Section B was adopted.

C. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as provisionally adopted by the Commission at its sixty-sixth session

1. Text of the draft conclusions

Paragraph 10

Paragraph 10 was adopted.

Section C.1 was adopted.

51. The CHAIRPERSON invited the Commission to consider the portion of chapter VII contained in document A/CN.4/L.840/Add.1.

2. Text of the draft conclusions with commentaries thereto provisionally adopted by the Commission at its sixty-sixth session

Paragraph 1

Paragraph 1 was adopted.

Commentary to draft conclusion 6 (Identification of subsequent agreements and subsequent practice)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

52. Mr. MURPHY proposed that, in the first sentence, the phrase "every application of a treaty presupposes an interpretation" be replaced with "application of a treaty almost inevitably involves some element of interpretation".

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

53. Mr. MURPHY proposed that, in the second sentence, the word "are", between the words "which" and "attributable", be replaced with "is", as that was the verb form that agreed with "conduct by non-State actors".

Paragraph (6), as amended, was adopted.

Paragraph (7)

54. Mr. FORTEAU proposed that, in the first sentence, the phrase "which takes place regardless of a treaty obligation" (*sans rapport avec une obligation conventionnelle*) be replaced with "which is not motivated by the treaty" (*qui n'est pas motivée par le traité*), wording that mirrored a dissenting opinion of Judge Holtzmann of

the Iran–United States Claims Tribunal[297] cited in paragraph (13) of the commentary to this draft article.

55. Mr. MURPHY supported Mr. Forteau's proposal, and at the end of the first sentence, he proposed adding the phrase "within the meaning of article 31, paragraph 3".

56. Mr. NOLTE (Special Rapporteur) said he had no objection to Mr. Murphy's proposal and that he could agree to Mr. Forteau's proposal, but that the English version of the proposal should read: "that is not motivated by a treaty obligation".

It was so decided.

Paragraph (7) was adopted with those amendments.

Paragraphs (8) to (10)

Paragraphs (8) to (10) were adopted.

Paragraph (11)

57. Mr. TLADI (Rapporteur) proposed that the final sentence be reformulated to read: "This point can be illustrated by examples from judicial and State practice."

Paragraph (11), as amended, was adopted.

Paragraph (12)

58. Mr. TLADI (Rapporteur) proposed that, in the third sentence, the word "has" be inserted between the words "Court" and "also", to emphasize the distinction between what followed them and what had been asserted in the preceding sentence.

59. Mr. MURPHY proposed that, in the second sentence, the words "of two States" be inserted between the words "'Joint Ministerial Communiqué'" and "to".

Paragraph (12) was adopted with those amendments.

Paragraph (13)

60. Mr. MURPHY and Mr. TLADI (Rapporteur) put forward some amendments to the formatting of the paragraph.

Paragraph (13) was adopted with those amendments.

Paragraphs (14) to (19)

Paragraphs (14) to (19) were adopted.

Paragraph (20)

61. Mr. MURPHY said that, in the first sentence, the word "also" should be replaced with "instead", as the idea was to contrast two different possibilities rather than to indicate a cumulative set of possibilities.

Paragraph (20), as amended, was adopted.

Paragraph (21)

62. Mr. TLADI (Rapporteur) proposed that, in the penultimate sentence, the word "modified" be replaced with "interpreted in a particular way".

Paragraph (21), as amended, was adopted.

Paragraph (22)

63. Mr. FORTEAU said that paragraph (22) was intended to explain draft conclusion 6, paragraph 1, which referred to agreements under article 31, paragraph 3, of the 1969 Vienna Convention. However, the example given in paragraph (22) concerned article 32 of the Convention, as it dealt with a subsequent agreement between certain parties only and not among all parties. It might be more appropriate to place that example after paragraph (25) of the commentary.

64. Mr. NOLTE (Special Rapporteur) said that he agreed with Mr. Forteau's proposal and that the commentaries would need to be renumbered accordingly.

Paragraph (22), as amended, was adopted.

Paragraph (23)

65. Mr. MURPHY said that, in the penultimate sentence, the word "practices" should be replaced with "conduct" and the word "are", between the words "which" and "attributable", should be replaced with "is". There appeared to be an error in the second footnote to the paragraph, which referred to "draft conclusion 5, para. 3": draft conclusion 5 did not have a third paragraph. Also in the same footnote, he proposed to insert the phrase "see also" before "*Maritime Dispute (Peru* v. *Chile)*".

66. Mr. NOLTE (Special Rapporteur) said that, in the footnote in question, the reference should be to "draft conclusion 5, paragraph 1". He concurred with all the amendments proposed by Mr. Murphy.

67. In the Commission's debates on the topic of the identification of customary international law, it had agreed that, under certain circumstances, inaction might constitute practice. The interpretation of treaties and the identification of customary international law were in a *mutatis mutandis* relationship and were not so different from each other that they should define a concept as basic as practice in a widely divergent manner. He therefore proposed that, in the second sentence, the formulation used in the topic on the identification of customary international law be reproduced, by inserting the words "including under certain circumstances, inaction" between the words "treaty" and "which".

Paragraph (23), as amended and with the correction to the second footnote to the paragraph, was adopted.

Paragraph (24)

Paragraph (24) was adopted.

Paragraph (25)

68. Mr. MURPHY proposed that, in the second sentence, the words "want to" be deleted and that the words

[297] Separate opinion of Judge Holtzmann, concurring in part, dissenting in part, in *The Islamic Republic of Iran* v. *the United States of America*, Iran–United States Claims Tribunal.

"into question", at the end of the sentence, be transposed to come between the words "call" and "the".

Paragraph (25), as amended, was adopted.

The commentary to draft conclusion 6 as a whole, as amended, was adopted.

69. The CHAIRPERSON invited the Commission to consider the portion of chapter VII contained in document A/CN.4/L.840/Add.2.

Document A/CN.4/L.840/Add.2

Commentary to draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

70. Mr. MURPHY proposed that, in the penultimate sentence, the words "contribute to" be deleted.

Paragraph (3), as amended, was adopted.

Paragraph (4)

71. Mr. MURPHY said that the entire text following the words "poison or poisonous weapons" constituted a direct quote and should be clearly reflected as such.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were adopted.

Paragraph (8)

72. Mr. MURPHY proposed that, in the first sentence, the words "of a treaty" be deleted and that, at the end of the final sentence, the colon be replaced with a full stop.

Paragraph (8), as amended, was adopted.

Paragraph (9)

Paragraph (9) was adopted.

Paragraph (10)

73. Mr. MURPHY proposed inserting the words "or widening" between the words "narrowing" and "the range", in order to mirror the language used in draft conclusion 7, paragraph 1.

74. Sir Michael WOOD said that, if it was decided to mirror that language, then the phrase "or otherwise determining the range of possible interpretations" should be added after "widening".

75. Mr. NOLTE (Special Rapporteur) said that, since paragraphs (10) and (12) made similar points, and since the example contained in paragraph (13) should follow directly after that contained in paragraph (11), paragraphs (10) and (12) should be merged. That could be accomplished by combining the beginning of paragraph (10), which read "State practice other than judicial or quasi-judicial contexts confirms that subsequent agreements and subsequent practice", with the portion of paragraph (12) that began "may not only contribute to specifying the meaning of a term". That would make for better readability and might address Sir Michael's point.

76. Mr. FORTEAU said that he supported the Special Rapporteur's proposal. With regard to the footnote to paragraph (12), which would need to be adapted to the new wording of paragraph (10), the initial part of the first sentence contradicted draft conclusion 7, paragraph 1. The latter indicated that subsequent agreements could result in narrowing or widening the range of possible interpretations, whereas that footnote said that it was not possible for there to be different possible interpretations. He therefore proposed that the initial part of the first sentence in the footnote be reformulated to read: "This means that the treaty may accord the parties the possibility to choose from a spectrum of different permitted acts" ["*Ceci signifie que le traité peut accorder aux parties la possibilité de choisir parmi une gamme de différents actes autorisés*"].

77. Mr. TLADI said that he supported Mr. Nolte's proposal, but within it, he proposed to replace the word "may" with "does".

78. Mr. MURPHY proposed the deletion of both instances of the word "may" in Mr. Nolte's proposal.

79. Sir Michael WOOD said that he agreed with the deletion of the first instance of "may" but that the second should be retained.

80. Mr. NOLTE (Special Rapporteur) said he supported the proposal just made by Sir Michael, which addressed both Mr. Murphy's and Mr. Tladi's concerns. As to the footnote to paragraph (12), he wondered whether, in the initial part of the first sentence, the insertion of the word "ultimately" between the words "may" and "exist" might address Mr. Forteau's concerns. That sentence referred to the process of interpretation and the role that different elements of interpretation played in arriving at the correct interpretation of a treaty; it did not contradict what was said in the draft conclusion and the commentary.

81. Mr. FORTEAU said that he persisted in thinking that Mr. Nolte's proposal did not resolve the contradiction between the footnote in question and draft conclusion 7, paragraph 1.

82. Mr. NOLTE (Special Rapporteur) proposed to leave paragraph (10) in abeyance so as to allow time for consultations in order to find suitable wording.

Paragraph (10) was left in abeyance.

Paragraph (11)

83. Mr. TLADI proposed, in the first sentence, inserting the phrase "ordinary meaning of the" between the words "whereas the" and "terms".

84. Mr. MURPHY proposed, in the final sentence, replacing the word "specified" with "clarified".

85. Mr. NOLTE (Special Rapporteur) said that the Commission had used the word "specified" on a number of occasions in the commentaries to indicate a narrowing down of meaning, whereas it used the word "clarified" to mean an expansion of it. For that reason, he preferred to retain the word "specified".

Paragraph (11), as amended by Mr. Tladi, was adopted.

Paragraph (12)

Paragraph (12) was left in abeyance.

Paragraphs (13) and (14)

86. Sir Michael WOOD said that paragraphs (13) and (14) related to an example of the use of the Red Cross, Red Crescent or Red Lion and Sun protective emblems. They indicated that States had a margin of discretion with regard to the use of the protective emblem and were not obligated to use it in all circumstances. He was not sure that this conclusion could be drawn from the example provided, however, and he was uncertain about suggesting a relaxation of the requirement to use the protective emblem on medical personnel and transports. Perhaps the Special Rapporteur would consider deleting paragraphs (13) and (14).

87. Mr. NOLTE (Special Rapporteur) said that he had attempted to address Sir Michael's concern, which the latter had expressed on another occasion, with the inclusion in paragraph (14) of the formulation "does not contain an obligation to use the emblem under any circumstances". He could further propose to replace the word "any" in that phrase with "such", which would have the effect of narrowing its meaning somewhat, but the Commission could not simply ignore those examples, since they were clearly justified in the situations cited.

88. Mr. FORTEAU said that the part of the commentary in which paragraph (13) was included concerned article 31 of the 1969 Vienna Convention and the subsequent agreement of all parties to a treaty. Yet, the third sentence of paragraph (13) referred to the fact that "States have in certain situations refrained from marking such convoys". He was not convinced that this was an example of an agreement between all the parties to a treaty.

89. Mr. NOLTE (Special Rapporteur) said that future draft conclusions would address practice that was engaged in by some but accepted by all parties to a treaty, as well as the broad area typically corresponding to multilateral treaties concerning practice that was followed by some parties and not contested by the others. The question was whether such practice, at least potentially, met the criteria for being considered a subsequent agreement. He did not believe any State would dispute the fact that, in the circumstances described in the example, it was not obligatory to use the protective emblem; he would therefore prefer to retain it.

90. Mr. MURPHY said that the issue raised by Sir Michael was extremely important. If the example was retained, he proposed that, in the first sentence of paragraph (13), the word "One" be replaced with "Another", since paragraph (12) would be merged with paragraph (10) and the Red Cross example would become a second example.

91. Given the problematic wording of paragraph (14), he proposed it be reformulated to read: "Such apparently uncontested practice by States confirms an interpretation of article 12 according to which the general obligation to use the protective emblem under exceptional circumstances allows a margin of discretion for the parties." That was a more cautious statement that might address Sir Michael's concerns.

92. Mr. Forteau had raised a very good point—it was not clear from the wording of paragraphs (13) and (14) that the practice described in the Red Cross example was one that was followed by all the parties in question. If, elsewhere in the commentary, the Commission referred to article 32, the example could be placed there; failing that, the Commission might envisage including a sentence to the effect that the Red Cross example was an illustration of article 32.

93. Mr. SABOIA said that he had been inclined to support Sir Michael's proposal to delete paragraphs (13) and (14); however, since the object of the emblems was to protect human life, there might be exceptional circumstances in which it was justified not to display them, and Mr. Murphy's proposal, in part, addressed such cases.

94. The CHAIRPERSON suggested that paragraphs (13) and (14) be left in abeyance until the next plenary meeting of the Commission.

It was so decided.

The meeting rose at 1 p.m.

3240th MEETING

Wednesday, 6 August 2014, at 3.05 p.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the Commission on the work of its sixty-sixth session (*continued*)

Chapter VII. *Subsequent agreements and subsequent practice in relation to the interpretation of treaties* (*concluded*) (A/CN.4/L.840 and Add.1–3)

C. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as provisionally adopted by the Commission at its sixty-sixth session (*concluded*)

2. Text of the draft conclusions with commentaries thereto provisionally adopted by the Commission at its sixty-sixth session (*concluded*)

Commentary to draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation) (*continued*)

1. The CHAIRPERSON invited the Commission to pursue its consideration of paragraphs (10), (12), (13) and (14) of the commentary to draft conclusion 7, which had been left in abeyance at the previous meeting, and to continue its consideration of document A/CN.4/L.840/Add.2, paragraph by paragraph.

Paragraphs (10) and (12) (*concluded*)

2. Mr. NOLTE (Special Rapporteur) said that, following consultation with Mr. Forteau, he proposed amending the beginning of the footnote to paragraph (12), which was being maintained, to read: "This is not to suggest that there may ultimately be different interpretations of a treaty".

The proposed wording of paragraphs (10) and (12), which had been merged, was read out: "State practice other than in judicial or quasi-judicial contexts confirms that subsequent agreements and subsequent practice not only contribute to specifying the meaning of a term in the sense of narrowing the possible meanings of the rights and obligations under a treaty, but they may also indicate a wider range of acceptable interpretations or a certain scope for the exercise of discretion which a treaty grants to States."

Paragraphs (10) and (12), as amended, were adopted.

Paragraphs (13) and (14) (*concluded*)

3. Mr. NOLTE (Special Rapporteur) said that, in line with the proposals made by Mr. Murphy at the previous meeting, he proposed amending the beginning of the first sentence of paragraph (13) to read: "Another possible example concerns". In the second sentence, he proposed replacing "under any circumstances" with "under all circumstances" in the English version and "States possess some discretion" with "States may possess some discretion". Paragraph (14) could also be amended to read: "Such practice by States may confirm an interpretation of article 12 according to which the obligation to use the protective emblem under exceptional circumstances allows a margin of discretion for the parties."

Paragraphs (13) and (14), as amended, were adopted.

Paragraph (15)

4. Mr. MURPHY proposed replacing "more mundane circumstances" with "other circumstances" in the fourth sentence.

5. Sir Michael WOOD, supported by Mr. HMOUD and Mr. SABOIA, said that article 9 of the Vienna Convention on Diplomatic Relations, which granted the State an absolute right, was perhaps not the most appropriate example.

6. Mr. TLADI endorsed Sir Michael's comments concerning the absolute nature of the right accorded to the State but said that, in the case of article 9 of the Vienna Convention on Diplomatic Relations, it was precisely because practice tallied exactly with the treaty that the example was appropriate.

7. Mr. NOLTE (Special Rapporteur) said that he would be willing to accept Mr. Murphy's proposal. He noted that, even if the State's right was absolute, it must be exercised in good faith.

8. Mr. FORTEAU said that, in order to address the concerns expressed, he proposed replacing the word "discretion" with "an apparently unconditional right" in the first sentence and reformulating the last sentence to read: "Thus, such practice confirms that article 9 provides an unconditional right."

9. Mr. NOLTE (Special Rapporteur) said that the proposal was along the right lines and he would simply add the word "apparently" before "unconditional" in the first sentence and the word "indeed" before "provides" in the last sentence.

10. Mr. MURPHY said that, in a similar vein, he would propose removing the words "for purposes unrelated to political or similarly serious concerns" in the penultimate sentence.

Paragraph (15), as amended, was adopted, subject to minor drafting changes in the English version.

Paragraph (16)

After a discussion in which Mr. Nolte (Special Rapporteur), Mr. Forteau and Sir Michael Wood took part, it was decided to hold paragraph (16) in abeyance.

Paragraph (17)

Paragraph (17) was adopted.

Paragraph (18)

11. Ms. JACOBSSON proposed replacing the words "of 'feasibility'" with "of 'feasible precautions'" in the last sentence.

The proposal was adopted.

After a discussion in which Ms. Jacobsson, Mr. Nolte (Special Rapporteur) and Mr. Murphy took part, it was decided to replace the words "clarified in effect by article 3 (4)" with "used in effect in article 3 (4)" in the second sentence.

Paragraph (18), as amended, was adopted, with a minor drafting change proposed by Ms. Jacobsson.

Paragraphs (19) and (20)

Paragraphs (19) and (20) were adopted.

Paragraph (21)

12. Mr. NOLTE (Special Rapporteur) proposed adding a full stop after the words "the treaty which it amends" in the second sentence and deleting the text in parentheses ("unless the latter provides otherwise") as well as the sentence "Like an agreement under … of its application." while retaining the footnote to that sentence, which would then be inserted at the end of the second sentence.

Paragraph (21), as amended, was adopted.

Paragraph (22)

13. Mr. NOLTE (Special Rapporteur) proposed adding the phrase "other than those set forth in article 39, if applicable" after "There do not seem to be any formal criteria," in the third sentence. The rest of the sentence would remain unchanged.

Paragraph (22), as amended, was adopted.

Paragraph (23)

Paragraph (23) was adopted.

Paragraph (24)

14. Mr. HMOUD proposed deleting the word "Most" at the beginning of the fourth sentence, which would then begin with "Writers".

15. Mr. NOLTE (Special Rapporteur) said that, in his view, the word "Most" should be retained as it reflected the fact that, as confirmed by the many sources cited in the second footnote to the paragraph, the position was shared by more than just a few writers.

16. Sir Michael WOOD said that, nonetheless, it was perhaps an exaggeration to claim that the view was shared by "Most writers". In order to address Mr. Hmoud's concern, he proposed replacing "Most" with "Many".

Paragraph (24), as amended, was adopted.

Paragraph (25)

17. Mr. HMOUD suggested that the last sentence could be reworded slightly by adding the words "according to a view" after "Indeed".

18. Mr. NOLTE (Special Rapporteur) noted that the position being expressed was not simply the view of a small number, as was confirmed once again by the many sources cited in the footnote. Furthermore, the position was not categorical, as it was not saying that it was impossible to fix the dividing line between the interpretation and the amendment or modification of a treaty but that it was, in practice, often "difficult, if not impossible".

19. Following a discussion in which Mr. PETRIČ, Mr. HMOUD, Mr. TLADI and Mr. NOLTE (Special Rapporteur) took part, the CHAIRPERSON proposed that, given the lack of consensus on Mr. Hmoud's proposal, paragraph (25) be held in abeyance and that the Special Rapporteur would consult the members concerned in order to agree on a solution.

Paragraph (25) was held in abeyance.

Paragraphs (26) to (28)

Paragraphs (26) to (28) were adopted.

Paragraph (29)

20. Mr. HMOUD proposed replacing the words "while raising the possibility" with "while not eliminating the possibility" at the beginning of the first sentence.

21. Mr. NOLTE (Special Rapporteur) argued that the first sentence referred to the judgment of the International Court of Justice in the case concerning the *Dispute regarding Navigational and Related Rights*, mentioned in paragraph (25) of the commentary to draft conclusion 7, in which the Court had not only not eliminated the possibility that a treaty could be modified through the subsequent practice of the parties, but had expressly raised that possibility.

22. Sir Michael WOOD proposed that, in order to address Mr. Hmoud's concern, the words "while raising the possibility" could be replaced by "while leaving open the possibility".

Paragraph (29), as amended, was adopted.

Paragraph (30)

23. Mr. MURPHY said that a footnote indicating the source should be added to the citation in the second sentence.

Paragraph (30) was adopted subject to the addition of the footnote proposed by Mr. Murphy.

Paragraphs (31) and (32)

Paragraphs (31) and (32) were adopted.

Paragraph (33)

24. Mr. MURPHY proposed replacing the words "The WTO case" with "The WTO situation" in the second sentence.

Paragraph (33), as amended, was adopted.

Paragraph (34)

Paragraph (34) was adopted.

Paragraph (35)

25. Mr. HMOUD, supported by Mr. VÁZQUEZ-BERMÚDEZ, proposed deleting the word "easily" from the last sentence.

26. Mr. NOLTE (Special Rapporteur) said that he did not support that deletion, as it would be inconsistent with paragraph (29). He proposed that the paragraph be held in abeyance until he had agreed on a solution with the members concerned.

Paragraph (35) was held in abeyance.

Paragraph (36)

Paragraph (36) was adopted.

Commentary to draft conclusion 8 (Weight of subsequent agreements and subsequent practice as a means of interpretation)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

27. Sir Michael WOOD proposed deleting the words "and sometimes rough" in the first sentence.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (14)

Paragraphs (5) to (14) were adopted.

The commentary to draft conclusion 8, as a whole, as amended, was adopted.

28. The CHAIRPERSON proposed a short break to allow the Special Rapporteur to consult with the members who had made proposals concerning paragraphs (16), (25) and (35) of the commentary to draft conclusion 7, which had been held in abeyance.

The meeting was suspended at 4.25 p.m. and resumed at 4.55 p.m.

29. The CHAIRPERSON invited the Commission to resume its consideration of paragraphs (16), (25) and (35) of the commentary to draft article 7, which had been held in abeyance.

Commentary to draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation) (*concluded*)

Paragraph (16) (*concluded*)

30. Sir Michael WOOD said that it had been agreed with the Special Rapporteur to amend the last sentence to read: "Hence, recourse may be had to other subsequent practice under article 32 not only to determine the meaning of the treaty in certain circumstances, but also and always to confirm the meaning resulting from the application of article 31."

Paragraph (16), as amended, was adopted.

Paragraph (25) (*concluded*)

31. Mr. NOLTE (Special Rapporteur) said that it had been agreed with Mr. Hmoud and Mr. Vázquez-Bermúdez to replace the word "often" with "sometimes" in the last sentence.

Paragraph (25), as amended, was adopted.

Paragraph (35)

32. Mr. VÁZQUEZ-BERMÚDEZ proposed adding the words "that establishes the agreement" to the last sentence, which would then read: "… is not formally called into question by an amendment or modification of a treaty by subsequent practice that establishes the agreement …".

Paragraph (35), as amended, was adopted.

The commentary to draft conclusion 7, as a whole, as amended, was adopted.

33. The CHAIRPERSON invited the members of the Commission to continue their consideration, paragraph by paragraph, of chapter VII, as contained in document A/CN.4/L.840/Add.3.

Draft conclusion 9 (*Agreement of the parties regarding the interpretation of a treaty*)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

Paragraph (6)

34. Mr. MURPHY suggested adding the words "at the European Court of Human Rights" after "interpreters" in the last sentence to indicate that the approach described was specific to that Court and did not necessarily apply to others.

35. Mr. NOLTE (Special Rapporteur) said that when the European Court of Human Rights adopted a particular position, it tended to be followed by other interpreters. If Mr. Murphy was concerned that the sentence was too prescriptive, it could be reworded to read "interpreters may possess some margin" rather than "interpreters possess some margin".

36. Sir Michael WOOD said that, alternatively, Mr. Murphy's concern could be addressed by keeping the word "possess" but adding the words "of the European Convention on Human Rights" after "interpreters".

37. Mr. NOLTE (Special Rapporteur) proposed that, in order to accommodate the views expressed by Mr. Murphy and Sir Michael, the end of the last sentence should be amended to read: "… interpreters, at least under the European Convention on Human Rights, possess some margin …".

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (10)

Paragraphs (7) to (10) were adopted.

Paragraph (11)

Paragraph (11) was adopted.

38. Mr. FORTEAU proposed the insertion of a new paragraph, a copy of which had been distributed, after paragraph (11) in order to reflect the view expressed by certain members during the plenary debate. That paragraph would read:

> "Some members considered on the other hand that the term 'agreement' has the same meaning in all provisions of the 1969 Vienna Convention. According to those members, this term designates any understanding which is binding upon the States concerned, and the case law referred to in the present commentary does not contradict this definition. Such a definition would not prevent to take into account, for the purpose of interpretation, a legally non-binding understanding, but then under article 32."

39. Mr. NOLTE (Special Rapporteur) said that, although he was not in favour of including a dissenting opinion in

the commentary, he would not object to the addition of the paragraph proposed by Mr. Forteau provided the English translation of the expression *faisant droit* was something other than "binding upon".

40. Sir Michael WOOD proposed replacing "which is binding upon" with "which has legal effect between".

The proposal was adopted.

41. Mr. MURPHY suggested replacing the words "prevent to take into account" with "prevent taking into account" in the last sentence and deleting the words "but then" at the end of the sentence.

The proposals were accepted.

42. The CHAIRPERSON said that he took it that the members of the Commission supported the inclusion of the paragraph proposed by Mr. Forteau, as amended by Sir Michael and Mr. Murphy in the English version, after paragraph (11).

It was so decided.

Paragraphs (12) to (16)

Paragraphs (12) to (16) were adopted.

Paragraph (17)

43. Mr. MURPHY suggested that, in the English version, the beginning of the sentence be amended to read: "This judgment suggests that in cases which concern treaties delimiting a boundary".

Paragraph (17), as amended in the English version, was adopted.

Paragraphs (18) to (23)

Paragraphs (18) to (23) were adopted.

The commentary to draft conclusion 9, as a whole, as amended, was adopted.

Commentary to draft conclusion 10 (Decisions adopted within the framework of a conference of States parties)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

44. Mr. MURPHY proposed putting the term "Conference of States parties" in quotation marks in the third sentence, as was the Commission's standard practice when referring to definitions.

Paragraph (4) was adopted with that minor drafting change.

Paragraphs (5) to (16)

Paragraphs (5) to (16) were adopted.

Paragraph (17)

45. Mr. MURPHY proposed deleting the first sentence and the words "For example" in the second sentence, as the Commission had already explained in paragraph (11) that the decisions adopted by the conferences of States parties, particularly the Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, could constitute subsequent agreement or practice.

46. Mr. NOLTE (Special Rapporteur) said that he would be willing to accept that proposal if the word "regularly" was added before "adopted 'additional agreements'" in the second sentence of paragraph (11).

Paragraph (17), as amended and with that modification to paragraph (11), was adopted.

Paragraphs (18) to (38)

Paragraphs (18) to (38) were adopted.

Section C.2, as a whole, as amended, was adopted.

Chapter VII of the report of the Commission, as a whole, as amended, was adopted.

Chapter IX. ***Immunity of State officials from foreign criminal jurisdiction*** **(A/CN.4/L.842 and Add.1)**

47. The CHAIRPERSON invited the members of the Commission to consider document A/CN.4/L.842, paragraph by paragraph.

A. Introduction

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraph 4

Paragraph 4 was adopted.

Paragraphs 5 and 6

48. Ms. ESCOBAR-HERNÁNDEZ (Special Rapporteur) read out the new version of the two paragraphs.

49. The CHAIRPERSON, having requested that copies of the new proposals be distributed so that the members could examine them, suggested that the text be considered at a later meeting.

It was so decided.

Paragraphs 7 to 8

Paragraphs 7 to 8 were adopted.

C. Text of the draft articles on Immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission

1. Text of the draft articles

Paragraph 9

50. Mr. FORTEAU said that, as the Commission had adopted a definition of the term "official", the footnote to paragraph 1 of article 1 should be deleted.

Paragraph 9, as amended, was adopted.

Section C.1 of chapter IX of the draft report of the Commission, as amended, was adopted.

Document A/CN.4/L.842/Add.1

2. Text of the draft articles and commentaries thereto provisionally adopted by the Commission at its sixty-sixth session

Commentary to draft article 2 (Definitions)

Paragraph (1)

51. The CHAIRPERSON suggested to the Special Rapporteur that, in view of the lateness of the hour, the Commission should continue its consideration of that paragraph at a later meeting.

The meeting rose at 6 p.m.

3241st MEETING

Thursday, 7 August 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the Commission on the work of its sixty-sixth session (*continued*)

Chapter IX. *Immunity of State officials from foreign criminal jurisdiction* (*continued*) (A/CN.4/L.842 and Add.1)

1. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter IX of the report contained in document A/CN.4/L.842, with specific regard to paragraphs 5 and 6, whose adoption had been left in abeyance and for which the Special Rapporteur had proposed reformulations (document without a symbol and only available in English and Spanish).

B. Consideration of the topic at the present session

Paragraph 5 (*concluded*)

2. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that her reformulation of paragraph 5 read:

> "In her third report, the Special Rapporteur commenced with an analysis of the normative elements of immunity *ratione materiae*, focusing on those aspects related to the subjective element. In this context, as was announced at the previous session of the Commission, the general concept of an 'official' was examined in the report, and the substantive criteria that could be used to identify such persons were considered, especially with respect to those who may enjoy immunity *ratione materiae* from foreign criminal jurisdiction. The report further considered a linguistic point concerning the choice of the most suitable term for designating persons who enjoy immunity, given the terminological difficulties posed by the term 'official' and its equivalents in the various languages, and suggested instead that 'organ' be employed. Following an analysis of relevant national and international judicial practice, treaty practice and the previous work of the Commission, the Special Rapporteur proposed two draft articles relating to the general concept of 'an official' for the purposes of the draft articles and the subjective scope of immunity *ratione materiae*. It was envisaged that the material and temporal scope of immunity *ratione materiae* would be the subject of consideration in the Special Rapporteaur's next report." ["*En su tercer informe, la Relatora Especial comenzó el análisis de los elementos normativos de la inmunidad* ratione materiae, *centrándose en los aspectos relacionados con el elemento subjetivo. En este marco, tal como se anunció en el anterior período de sesiones, examinó el concepto general de 'funcionario del Estado' y expuso los criterios sustantivos que podrían emplearse para identificar a dichas personas, en especial respecto de los posibles beneficiarios de la inmunidad* ratione materiae *de jurisdicción penal extranjera. Igualmente abordó una cuestión lingüística: la elección del término más adecuado para designar a las personas que se benefician de la inmunidad, habida cuenta de los problemas terminológicos que planteaba el uso del término 'funcionario' y sus equivalentes en las demás versiones lingüísticas, y propuso el empleo del término 'órgano'. Tras un análisis de la práctica judicial a escala nacional e internacional, de los tratados y de ciertos trabajos previos de la Comisión, la Relatora Especial presentó dos proyectos de artículos dedicados al concepto general de 'funcionario' a los efectos del proyecto de artículos y al alcance subjetivo de la inmunidad* ratione materiae. *Está previsto que el alcance material y temporal de la inmunidad* ratione materiae *se examine en el siguiente informe de la Relatora Especial.*"]

3. Mr. VÁZQUEZ-BERMÚDEZ said that, in the second sentence of the English version of the text, the words "an 'official'" should be replaced by "a 'State official'", which was a more accurate translation of the Spanish original.

Paragraph (5), as reformulated by the Special Rapporteur and with the amendment to the English text proposed by Mr. Vázquez-Bermúdez, was adopted.

Paragraph (6) (*concluded*)

4. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that her reformulation of paragraph 6 read:

> "Following its debate on the third report of the Special Rapporteur, the Commission, at its 3222nd meeting, on 11 July 2014, decided to refer the draft articles to the Drafting Committee." ["*Tras las deliberaciones sobre el tercer informe de la Relatora Especial, la Comisión en su 3222a sesión, celebrada el 11 de julio de 2014, decidió remitir al Comité de Redacción los proyectos de artículos*."]

Paragraph (6), as reformulated by the Special Rapporteur, was adopted.

Section B of chapter IX of the report of the Commission, as amended, was adopted.

C. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission (*continued*)

2. Text of the draft articles and commentaries thereto provisionally adopted by the Commission at its sixty-sixth session (*continued*)

5. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter IX of the report contained in document A/CN.4/L.842/Add.1.

Commentary to draft article 2 (Definitions) (*continued*)

Paragraph (1) (*continued*)

6. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she had prepared a revised text that incorporated Commission members' comments. She requested that the adoption of the paragraph be deferred until she had had time to consult the members concerned.

It was so decided.

Paragraph (1) was left in abeyance.

Paragraph (2)

7. Mr. MURPHY said that, in the first sentence of the English text, the words "the concept of" were superfluous and should be deleted and that, in the final sentence, the words "are identified based on" should be replaced with "both fall within", the current formulation being inaccurate.

8. Sir Michael WOOD said that he supported Mr. Murphy's proposals. He further proposed that, in the first sentence, the phrase "under the present draft articles" be inserted between the words "jurisdiction" and "either". The reason for his proposal was that, in draft article 1, a series of persons who enjoyed immunity under special regimes had already been excluded from the scope of the draft articles, which therefore could not be said to apply to "any person who enjoys immunity", as the commentary currently indicated.

9. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said she could agree to those proposals.

10. Mr. VÁZQUEZ-BERMÚDEZ said he disagreed with Sir Michael's proposal, since it was understood that all explanations in the commentaries were for the purposes of the present draft articles. In Mr. Murphy's first proposal, the phrase *del concepto* should be retained in the Spanish version of the text; in the English text, the words "concept of" should be replaced with "term".

11. Sir Michael WOOD said that he agreed with the proposal made by Mr. Vázquez-Bermúdez, which read well in English. He proposed, in the second sentence, deleting the words "the present".

12. The CHAIRPERSON said he took it that the Commission wished to reformulate the paragraph to read:

> "The definition of the term 'State official' contained in draft article 2 (*e*) is general in nature, applicable to any person who enjoys immunity from foreign criminal jurisdiction under the present draft articles, either immunity *ratione personae* or immunity *ratione materiae*. Consequently, the nature and object of draft article 2 (*e*) must not be confused with the nature and object of draft articles 3 and 5, which define who enjoys each category of immunity. The persons who enjoy immunity *ratione personae* and immunity *ratione materiae* both fall within the definition of 'State official', which is common to both categories" ["*La definición del concepto de 'funcionario del Estado' contenida en el apartado* e *del proyecto de artículo 2 tiene un carácter general, aplicándose a cualquier persona que se beneficie de la inmunidad de jurisdicción penal extranjera en virtud del presente proyecto de artículos, tanto si se trata de inmunidad* ratione personae *como de inmunidad* ratione materiae. *En consecuencia, no debe confundirse la naturaleza y objeto del proyecto de artículo 2, apartado* e*, con la naturaleza y objeto de los proyectos de artículos 3 y 5, dedicados a definir quiénes son los beneficiarios de cada categoría de inmunidad. La determinación de los beneficiarios de la inmunidad* ratione personae *y de la inmunidad* ratione materiae *se realiza partiendo la definición de 'funcionario del Estado' que es común a ambas categorías*."]

Paragraph (2), as amended, was adopted.

Paragraph (3)

13. Mr. MURPHY said that, in the first sentence, the placement of the terms "official" and "State official" should be inverted, and in the first and second sentences, the phrase "concept of" should be replaced with "term". In the footnote to the paragraph, it might be useful to cite the articles in each of the listed treaties in which the terms "State official" or "official" appeared, and not solely the name of the treaty.

14. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the words "concept of" should be replaced with "term" throughout the text. Although she was not opposed, in theory, to amending the footnote along the lines proposed by Mr. Murphy, doing so would make it cumbersome and difficult to read. In her view, the final sentence of the footnote, which referred to her third report on the topic (A/CN.4/673), provided the reader with sufficient information and avoided overburdening the footnote with references. She pointed out that, in the second sentence of paragraph (3), the opening phrase in the Spanish text, *Por otro lado*, had been omitted in the English version. Lastly, she proposed that, in the English text of the same sentence,

the word "each" be inserted between the words "in" and "individual", and the word "domestic" be deleted.

15. Mr. MURPHY said that simply replacing the word "individual" with "different" in that sentence would make for the clearest expression in English.

16. The CHAIRPERSON suggested that the word "Furthermore" be inserted at the beginning of the second sentence. The reformulated sentences would read: "There is no general definition in international law of the term 'State official' or 'official', although … . Furthermore, the term 'State official', or simply 'official', can mean different things in different domestic legal systems. Consequently, … ."

Paragraph (3), as amended, was adopted.

Paragraph (4)

17. Mr. FORTEAU said that current wording of paragraph (4) did not reflect a decision taken in the plenary and in the Drafting Committee to include a "without prejudice" clause regarding the rules applicable to legal persons. In France, there were examples in case law in which legal persons had been granted immunity from criminal prosecution. He therefore proposed to amend the paragraph to read:

> "The term 'individual' in the definition of 'State official' is used to indicate that the present draft articles cover only natural persons. The present draft articles are without prejudice to any rules that may apply to legal persons in this area" ["*La définition du 'représentant de l'Etat' emploie le terme 'individu' pour indiquer que le présent projet d'articles couvre uniquement les personnes physiques. Le présent projet d'articles est sans préjudice des règles applicables en la matière aux personnes morales*."]

18. Sir Michael WOOD said that he fully supported Mr. Forteau's proposal.

19. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that her recollection was that a wider range of opinions had been expressed on that issue than had been reflected in Mr. Forteau's proposal. Various members had expressed the view, not that the draft articles should not apply in any circumstances to legal persons, but rather that, given the current state of development of international law, legal persons did not enjoy immunity from foreign criminal jurisdiction. Some members had referred to the fact that not all domestic legal systems provided for the criminal prosecution of legal persons, and if the Commission wished to make that point in the commentary, she was not opposed.

20. Mr. MURPHY said that he supported Mr. Forteau's proposal. The reality was that the Commission had not, either in the Special Rapporteur's reports[298] or in the memorandum by the Secretariat,[299] analysed the relevant case law, statements made by Governments or treaty provisions concerning the criminal prosecution of legal persons in national jurisdictions. Certainly, in the United States, it was possible to prosecute a legal person, and there might well be cases in which a legal person might be entitled to immunity: for instance, if it was an instrumentality of a foreign Government. For the time being, the most the Commission could do was to state its intention to leave the issue of the criminal prosecution of legal persons in national jurisdictions outside the scope of the present topic.

21. The CHAIRPERSON said he took it that the Commission wished to adopt the paragraph as amended by Mr. Forteau.

Paragraph (4), as amended, was adopted.

Paragraph (5)

22. Mr. MURPHY proposed, in the second sentence, to replace the phrase "the technique used by the Commission to identify" with "the Commission identified"; to replace the words "is the" with "by"; and to replace the words "of individuals cited" with "them". In the third sentence, the phrase "the present draft articles" should be replaced with "this definition" and the word "cannot" should be replaced with "need not".

23. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she could agree to all of Mr. Murphy's amendments to the second sentence except for the replacement of the words "of individuals cited", which she wished to retain. With regard to the third sentence, she wished to retain the phrase "the present draft articles". Rather than replacing the word "cannot" with "need not", she would prefer to replace it with "should not", which was a better translation of the Spanish *no deben*.

Paragraph (5) was adopted with those amendments.

Paragraph (6)

24. Mr. NOLTE, referring to the second sentence, said that what made it difficult to define the term "State official" was the wide range of positions occupied by individuals in national legal systems—not the diversity of the individuals themselves. He therefore proposed that, in the second sentence, the words "the position of" be inserted between the words "diversity of" and "the individuals"; in the third sentence, the words "positions of" should be inserted between the words "those" and "individuals"; and in the fourth sentence, the word "names" be replaced with "positions". On another point, the word "specific" should be inserted between the words "a" and "link" in the last sentence.

25. Mr. MURPHY said that he agreed with Mr. Nolte's proposals regarding the inclusion of references to positions. However, he proposed to delete the third sentence altogether, since paragraph (7) of the commentary set out the very kind of list that paragraph (6) deemed "neither possible nor suitable". In the fourth sentence, he proposed to replace the words "In both cases, the" with "Such a".

26. Mr. VÁZQUEZ-BERMÚDEZ said that the Special Rapporteur had probably meant to say that it was not possible to include an indicative list in the draft articles; he therefore proposed inserting the words "in a draft article" between the words "list" and "of".

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[298] *Yearbook … 2012*, vol. II (Part One), document A/CN.4/654, and *Yearbook … 2013*, vol. II (Part One), document A/CN.4/661.

[299] Document A/CN.4/596 and Corr.1, mimeographed; available from the Commission's website, documents of the sixtieth session (2008). The final text will be reproduced in an addendum to *Yearbook … 2008*, vol. II (Part One).

27. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she agreed with the amendment proposed by Mr. Vázquez-Bermúdez; it had indeed been her intention to reflect the conclusion reached in the debate that it was not possible, in a set of draft articles, to include either an exhaustive or indicative list of persons who enjoyed immunity.

28. She also agreed with Mr. Nolte's proposal to insert the word "specific" (*específico*) between the words "a" and "link" in the final sentence. As to his proposal to insert the word "positions" in three places, she considered that word to be implicit in the meaning of the draft commentary as it currently stood. She recalled that, in the debates in the plenary and the Drafting Committee, it had been agreed that reference to a "specific post" (*puesto concreto*), "specific designation" (*designación concreta*) or "specific position" (*posición específica*) could be problematic, given that, in certain legal systems and States, a person could represent the State or exercise a State function without having been formally designated to do so. Use of the expression "position of the individual" (*posicíon del individuo*) might give the erroneous impression that the Commission was referring to posts specifically included in the organization charts of Governments.

29. Mr. NOLTE said that, in the context in question, the Commission's aim was to identify the "State officials" to whom immunity applied, with reference to their specific link to the State, which was usually denoted by the word "position". That word was sufficiently general so as not to exclude individuals to whom immunity might apply; at the same time, it was not entirely identical to the individual's rank in the State hierarchy.

30. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, in light of Mr. Nolte's explanation, she could go along with his proposals.

Paragraph (6), as amended, was adopted.

Paragraph (7)

31. Mr. CANDIOTI said that, in the first sentence of the English text, the phrase "for purely indicative purposes" should be replaced with "only by way of example".

32. Mr. TLADI said that he had some difficulty with the paragraph, in particular the classification of State officials into four supposedly distinct groups. He suggested that the paragraph either be deleted or redrafted in order to present the examples of State officials who enjoyed immunity in a single list.

33. Mr. FORTEAU said that he was in favour of Mr. Tladi's proposal for a paragraph containing a simple list of examples, to which footnotes referring to relevant cases should be added.

34. Sir Michael WOOD said that his preference was for the paragraph's deletion because the examples provided were not particularly helpful. Many did not relate to cases where courts had actually considered whether an individual was a State official for the purposes of immunity. Alternatively, the paragraph should be substantially restructured.

35. Mr. VÁZQUEZ-BERMÚDEZ said that, as he understood it, it was not the Special Rapporteur's intention to divide State officials into distinct groups, but rather to make a systematic listing of examples of judicial practice involving State officials. In his view, the paragraph was useful for illustrative purposes.

36. Mr. PETRIČ said that he had no recollection of any discussion, either in the plenary or in the Drafting Committee, concerning a categorization of State officials like that presented in the paragraph. He therefore supported Mr. Tladi's proposal that the paragraph be either deleted or redrafted, possibly with the list of State officials placed in a footnote.

37. Mr. SABOIA said that, in view of the limited time available for redrafting, he was in favour of deleting the paragraph.

38. Mr. NOLTE said that the paragraph raised a number of difficulties, in particular with regard to the relevance of the cases referred to in the footnotes. He therefore agreed with previous speakers that the paragraph should be deleted or shortened.

39. Mr. MURPHY said that, while he appreciated the Special Rapporteur's attempt to respond to the wish of certain members for a list of examples, the paragraph as it stood was confusing. It would be helpful if it could be reformulated in simplified form with a single list of examples and one footnote referring to relevant cases, but without descriptive information. However, in view of time constraints, he suggested that the paragraph simply be deleted and consideration be given to including such a list in a future document.

40. Mr. ŠTURMA said that he endorsed Mr. Tladi's proposal, as supplemented by Mr. Forteau, for a streamlined paragraph with a footnote that listed relevant cases.

41. Mr. CANDIOTI said that he too supported Mr. Tladi's proposal. It was perhaps a little premature for the Commission to be giving examples of State officials before it had made further progress on establishing a definition of the term. However, the work done so far would provide a valuable basis for future consideration of the issues involved.

42. Mr. KITTICHAISAREE said that he was in favour of deleting the paragraph and exploring the subject further in 2015.

43. The CHAIRPERSON suggested that the Commission should defer consideration of paragraph (7) pending further consultations.

It was so decided.

Paragraph (8)

44. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, in the first sentence of the English text, the phrase "in the sense these terms are used in the present draft articles" should be replaced with "in accordance with the present draft articles".

Paragraph (8) was adopted with that amendment.

Paragraph (9)

45. Mr. MURPHY said that the first part of the fourth sentence, which read "This is a clear and simple statement, summing up the Special Rapporteur's proposal regarding the criteria for identifying what constitutes an official", might cause confusion, since the Special Rapporteur's original proposal had been changed by the Commission. He therefore suggested that the first part of the sentence be deleted, but that the first footnote, which referred to the draft article originally proposed by the Special Rapporteur, be retained.

46. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the sentence, which in her view did not cause confusion, had been reproduced verbatim from the report of the Drafting Committee.

47. Sir Michael WOOD proposed the deletion of the words "summing up the Special Rapporteur's proposal".

48. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that if express reference was not to be made to her proposals in the commentary, the same procedure should be followed with respect to the other commentaries considered by the Commission.

Paragraph (9), as amended by Sir Michael Wood, was adopted.

Paragraph (10)

49. Mr. KITTICHAISAREE proposed that, in the final sentence, the word "parliamentary" be replaced with "constitutional".

50. Mr. MURPHY said that, in the second sentence, the phrase "as the commentary to draft article 3 states" should be deleted, since the footnote to that sentence already referred to that commentary. In the final sentence, the clause "who can hardly be described as performing State functions", referring to monarchs, was inaccurate and should therefore be replaced with "who typically do not perform State functions".

51. Sir Michael WOOD agreed with Mr. Kittichaisaree's proposal. Referring to Mr. Murphy's suggestion, he observed that some Heads of State other than monarchs also had essentially representational State functions. He therefore suggested that the part of the final sentence under consideration should read "certain categories of individuals, such as those Heads of State who typically do not perform State functions".

52. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the word "monarchs" had been used because it was those Heads of State in particular who had been the focus of relevant debates in the plenary and the Drafting Committee. However, she found Sir Michael's final proposal acceptable. In order to align the English text with the Spanish, the word "laws" in the third sentence should be replaced with "acts".

53. Mr. NOLTE said that the phrase *stricto sensu* in the final sentence was not really appropriate, since the Heads of State in question performed essential State functions. He therefore proposed the replacement of that phrase by "in a narrow sense".

54. Mr. PETRIČ, supported by Sir Michael WOOD, proposed that the words "categories of" in the final sentence be deleted.

55. The CHAIRPERSON said that he took it that the Commission wished to adopt the paragraph with the following amendments: in the third sentence of the English text, "laws" would be replaced with "acts" and the final sentence would read: "Lastly, it must be noted that the separate reference to representation of the State as one of the criteria for identifying a link with the State makes it possible to cover certain individuals, such as those Heads of State who do not typically perform State functions in the narrow sense, but who most certainly represent the State."

It was so decided.

Paragraph (10), as amended, was adopted.

Paragraph (11)

56. Mr. NOLTE said that the phrase "who performs or may perform" in the third sentence might give rise to confusion and should perhaps be reformulated. As it was not clear to what the word "situation" in the penultimate sentence referred, he suggested that it be replaced with "law".

57. Mr. MURPHY, referring to the first proposal, suggested that the words "or may perform" be deleted.

58. Mr. VÁZQUEZ-BERMÚDEZ said that, in the first sentence of the Spanish text, the words *funciones del Estado* should be replaced with *funciones estatales*. With regard to the phrase "who performs or may perform", which could indeed cause confusion, it was his understanding that the Special Rapporteur was seeking to capture the idea that the term "State official" referred to individuals who were in a position to perform State functions. He shared Mr. Nolte's concern with regard to the word "situation" and agreed that it would be more appropriate to speak of "laws" or "rules". Lastly, in the final sentence, he suggested that the word "infelicitous" be replaced with something less negative, such as "not the best".

59. Sir Michael WOOD said that the two instances of the word "properly" in the first two sentences of the English text should be deleted. The fourth sentence seemed to deal with a number of separate issues and should be simplified. He suggested that a full stop be placed after "between the official and the State" and that the remainder of the sentence be deleted.

60. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) agreed with the amendment to the Spanish text proposed by Mr. Vázquez-Bermúdez. She also agreed with Sir Michael's proposal to delete the word "properly". With regard to the phrase "who performs or may perform", she said that, if its meaning was not sufficiently clear, it could perhaps be replaced by "who is in a position to perform". Although the word "situation" had been used

in previous work of the Commission in similar contexts, she had no problem with it being replaced by "laws" or "legislation". The word "infelicitous" had been used in the report of the Drafting Committee, but she would be in favour of replacing it with the wording proposed by Mr. Vázquez-Bermúdez.

61. Mr. NOLTE and Mr. MURPHY were in favour or replacing "who may perform" with "who is in a position to perform".

62. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) proposed that the fourth sentence read: "The reference to the exercise of State functions defines more precisely the requisite link between the official and the State, which makes it possible to take sufficient account of the fact that immunity is granted to the individual for the benefit of the State" ["*Con la referencia al ejercicio de funciones estatales se define con mayor precisión el vínculo que debe existir entre el funcionario y el Estado que permite tomar sufficientemente en consideración que la immunidad se ortoga al individuo en beneficio del Estado*"].

Paragraph (11), as amended by the Special Rapporteur, Mr. Vázquez-Bermúdez, Mr. Nolte and Sir Michael Wood, was adopted.

Paragraph (12)

63. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) drew attention to some omissions in the English version of the text, which should read: "It should be noted that the use of the terms 'represents' and 'exercises' in the present tense …".

Paragraph (12) was adopted with that correction to the English text.

Paragraph (13)

64. Mr. MURPHY, supported by Mr. NOLTE and Sir Michael WOOD, said that, as he understood it, the Commission had agreed not to address the issue of contractors because, although it had touched on the issue in its debates, its reports had not so far contained any analysis of national case law or legislation regarding the immunity of contractors from foreign criminal jurisdiction. It would therefore be imprudent and inappropriate for the Commission to take a definitive position at that juncture. He proposed the deletion of the portion of the paragraph after the second sentence, in order to leave open the possibility that the Special Rapporteur might examine the question in greater detail at some point in the future.

65. Mr. SABOIA, supported by Mr. CANDIOTI, said that he favoured the retention of the whole paragraph as a means of indicating that the matter was under discussion. It reflected the tenor of the debate and might assist in the comprehension of the issue in the future.

66. Mr. VÁZQUEZ-BERMÚDEZ said that he was in favour of retaining most of the passage whose deletion had been proposed, except for the phrase "including contractors".

67. Mr. FORTEAU said that he supported the deletion proposed by Mr. Murphy; the description of contractors as *de facto* officials was incorrect. If there was a contract, there was a link between the State and the contractor and they were therefore *de jure* officials. He would, however, recommend the retention of the final sentence.

68. Sir Michael WOOD said that, in view of Mr. Saboia's comments, he proposed a compromise solution consisting of the amendment of the third sentence to read: "However, the majority of Commission members are of the view that the link cannot be interpreted so broadly as to cover all *de facto* officials." The fourth sentence should be retained. The fifth sentence should be deleted, whereas the final sentence should be kept. With those changes, the paragraph would exactly reflect the debate which had taken place, leave the Commission's position open and meet the concerns expressed by Mr. Saboia.

69. Mr. NOLTE, Mr. KITTICHAISAREE, Mr. MURPHY and Mr. PETRIČ endorsed the compromise wording proposed by Sir Michael.

70. Mr. MURPHY proposed replacing "the definition" with "a definition" in the last sentence, since the Commission had not yet established a definition of an "act performed in an official capacity".

71. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) expressed her agreement with the compromise wording.

Paragraph (13), as amended by Sir Michael Wood and Mr. Murphy, was adopted.

Paragraph (14)

72. Mr. VÁZQUEZ-BERMÚDEZ drew attention to the second sentence of the English version, which should refer to State officials holding a high- or mid-level rank.

73. Sir Michael WOOD said, with reference to the second sentence, that the reason why most cases in which persons had been granted immunity concerned high-level officials was that they were the persons whose prosecution had been sought. He therefore proposed recasting the beginning of the second sentence to read: "Although in many cases the persons who have been recognized as State officials for the purpose of immunity hold a high or middle rank". He also proposed that portion of the final sentence after the words "State official" be deleted, since there was no evidence to suggest that the level of the official was relevant when it came to deciding whether someone was an official for the purposes of the draft articles.

74. Following a clarification provided by Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur), Mr. MURPHY proposed replacing "the latter" with "the individual" in the first sentence.

Paragraph (14), as amended by Sir Michael Wood and Mr. Murphy, was adopted.

Paragraph (15)

Paragraph (15) was adopted.

Paragraph (16)

75. Mr. VÁZQUEZ-BERMÚDEZ proposed the insertion of the word "necessarily" between "not" and "mean" in the third sentence (*no … tengan necesariamente*).

76. Sir Michael WOOD queried the last part of the final sentence of the paragraph.

77. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) proposed amending that part of the sentence to read: "in order to ensure that the institutions charged with applying immunity at the national level correctly interpret the term 'State official' in the way it is used in the present draft articles" ["*a fin de asegurar que los órganos encargados de la aplicación de la immunidad a nivel nacional interpreten correctamente el término 'funcionario estatal' en el sentido que al mismo se le da en el presente proyecto de artículos*"].

Paragraph (16), as amended by the Special Rapporteur and Mr. Vázquez-Bermúdez, was adopted.

Commentary to draft article 5 (Persons enjoying immunity *ratione materiae*)

Paragraph (1)

78. Sir Michael WOOD proposed the deletion of the phrase "acting as such" in the final sentence.

79. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the phrase reproduced the wording of draft article 5 and should therefore not be deleted.

80. Mr. SABOIA (Chairperson of the Drafting Committee) agreed with the Special Rapporteur. He drew attention to the section of the Drafting Committee's report on draft article 5 which had explained that the words "acting as such" had been deemed the most appropriate way of identifying a State official as an individual who represented the State or who exercised State functions.

81. Mr. MURPHY considered that confusion might arise from the words "defined as" in the final sentence, and he therefore proposed their replacement with "referred to as such".

82. Sir Michael WOOD endorsed Mr. Murphy's proposal and suggested that the first part of the sentence be recast to read: "There is no list of actual persons who enjoy immunity; instead in the case of immunity *ratione materiae* they have been referred to as 'State officials acting as such'."

Paragraph (1), as amended by Mr. Murphy and Sir Michael Wood, was adopted.

Paragraph (2)

83. Mr. MURPHY proposed the insertion of the phrase "in these draft articles" in the second sentence, after the words "found it impossible".

84. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) drew attention to the fact that the Spanish text was less categorical: the phrase "did not consider it possible" rather than "found it impossible" would be a better equivalent in English.

Paragraph (2), as amended by Mr. Murphy and with the amendment to the English text proposed by the Special Rapporteur, was adopted.

Paragraph (3)

85. Mr. NOLTE said that the second part of the third sentence, which began with the words "Nevertheless, the majority of members", was misleading, since it could be understood to mean that those members believed that immunity from foreign criminal jurisdiction applied to all individuals.

86. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the English text should refer to "these individuals" rather than "all individuals".

Paragraph (3) was adopted with that amendment to the English text.

The meeting rose at 1 p.m.

3242nd MEETING

Thursday, 7 August 2014, at 3.05 p.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the Commission on the work of its sixty-sixth session (*continued*)

Chapter IX. *Immunity of State officials from foreign criminal jurisdiction* (*concluded*) (A/CN.4/L.842 and Add.1)

C. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission (*concluded*)

2. Text of the draft articles and commentaries thereto provisionally adopted by the Commission at its sixty-sixth session (*concluded*)

1. The CHAIRPERSON invited the Commission to resume its consideration of document A/CN.4/L.842/Add.1, paragraph by paragraph.

Commentary to draft article 5 (Persons enjoying immunity r*atione materiae*) (*concluded*)

Paragraph (4)

2. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the quotation marks at the end of the first sentence had not been included in the English version, which

should read: "and Ministers for Foreign Affairs 'when they have acted in the capacity of State officials'".

Paragraph (4) was adopted with that correction to the English text.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

The commentary to draft article 5, as amended, was adopted.

3. The CHAIRPERSON invited the members of the Commission to resume their consideration of paragraphs (1) and (7) of the commentary to draft article 2, which had been held in abeyance.

Commentary to draft article 2 (Definitions) (*concluded*)

Paragraph (1) (*concluded*)

4. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that paragraph (1), which had been reworded to take account of the views of Commission members and circulated in Spanish and English, now read:

> "The purpose of draft article 2, paragraph (*e*), is to define the persons to whom the present draft articles apply, namely 'State officials'. Defining the concept of State official helps to understand one of the normative elements of immunity: the individuals who enjoy immunity. Most members of the Commission thought it would be useful to have a definition of 'State official' for the purposes of the present draft articles, given that immunity from foreign criminal jurisdiction is applicable to individuals. Several members of the Commission expressed doubts about the need to include this definition."

Paragraph (1) was adopted.

Paragraph (7) (*concluded*)

5. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, although several members had suggested that paragraph (7) be deleted, she had chosen to propose a simplified version instead. All the footnotes to the paragraph had been merged into a single footnote in which all the comments on the judgments cited had been deleted. The revised paragraph, which had been circulated in Spanish and English (document without a symbol, distributed in the meeting), would read:

> "Nevertheless, below are some examples of several 'State officials' that have appeared in national and international judicial case law regarding immunity of jurisdiction: a former Head of State; a Minister of Defence and a former Minister of Defence; a Vice-President and Minister of Forestry; a Minister of Interior; an Attorney-General and a General Prosecutor; a Head of National Security, a former Intelligence Service Chief; a director of a Maritime Authority; an Attorney-General and various lower-ranking officials of a federal State (a prosecutor and his legal assistants, a detective in the Attorney-General's office and a lawyer in a State agency); military officials of various ranks, and various members of Government security forces and institutions, including the Director of Scotland Yard; border guards; the deputy director of a prison; and the Head of a State archives.*"

6. Sir Michael WOOD proposed rewording the beginning of the sentence, in the English version, to read: "Nevertheless, by way of example, the following 'State officials' have appeared in national and international case law regarding immunity from jurisdiction: …".

The proposal was adopted.

7. Mr. NOLTE pointed out that in the *United States* v. *Noriega* case, the question of whether Mr. Noriega had been a State official had never been examined, because in its judgment, the Court of Appeals had stated that Mr. Noriega had never served as the constitutional leader of Panama. The reference to that case in the footnote was accordingly not relevant and should be deleted.

8. Mr. SABOIA said that to bring up the *United States* v. *Noriega* case at that stage of the discussions was to be deliberately provocative. That case was not a typical case of a Head of State being prosecuted despite his or her status as Head of State; Mr. Noriega had been kidnapped by foreign military forces, and many lives had been lost during the operation. The members of the Commission could not ignore history on the grounds that they were dealing exclusively with the law.

9. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she saw no reason to delete the reference to the *United States* v. *Noriega* case, as it had been analysed in the second report on the immunity of State officials from foreign criminal jurisdiction[300] and in the commentaries adopted by the Commission at its previous session[301]. She therefore called on Mr. Nolte to withdraw his proposal.

10. Mr. NOLTE said that his intention had certainly not been to be provocative, much less to deny history, but simply to highlight the incongruity of citing, among the examples of cases in which the courts had determined which individuals had the status of State officials for the purpose of invoking immunity, a case in which that question had not been addressed. In the interest of consensus, however, he agreed to withdraw his proposal.

Paragraph (7) was adopted, with the amendment proposed by Sir Michael Wood to the English version.

The commentary to draft article 2, as a whole, as amended, was adopted.

Section C.2 of chapter IX of the draft report of the Commission, as a whole, as amended, was adopted.

Section C of chapter IX of the draft report of the Commission, as a whole, as amended, was adopted.

Chapter IX of the draft report of the Commission, as a whole, as amended, was adopted.

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[300] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/661.

[301] *Ibid.*, vol. II (Part Two), pp. 39 *et seq.*, para. 49.

Chapter VI. *The obligation to extradite or prosecute* (aut dedere aut judicare) (A/CN.4/L.839)

11. The CHAIRPERSON invited the Commission to consider chapter VI, contained in document A/CN.4/L.839, paragraph by paragraph.

12. Mr. KITTICHAISAREE (Chairperson of the Working Group) said that in assembling the final document, the section headings had been mislabelled: sections D (Gaps in the existing conventional regime and the "third alternative"), E (The priority between the obligation to prosecute and the obligation to extradite, and the scope of the obligation to prosecute), F (The relationship of the obligation to extradite or prosecute with *erga omnes* obligations or *jus cogens* norms), G (The customary international law status of the obligation to extradite or prosecute) and H (Other matters of continued relevance in the 2009 general framework) were to be renamed paragraphs (*c*), (*d*), (*e*), (*f*) and (*g*) and inserted after paragraphs (*a*) (Typology of provisions in multilateral instruments) and (*b*) (Implementation of the obligation to extradite or prosecute) under item 3 (Summary of work) in section C (Final report on the topic).

A. Introduction

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 5 to 7

Paragraphs 5 to 7 were adopted.

Paragraph 8

13. Mr. TLADI proposed that a sentence be added at the end of the paragraph, to read: "It also expressed its deep appreciation to the Chairperson of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*), Mr. Kriangsak Kittichaisaree, for his very valuable contribution and the work done in an efficient and expeditious manner."

The proposal was adopted.

14. Mr. HMOUD proposed also adding an expression of thanks to the former Special Rapporteur, Mr. Zdzislaw Galicki.

The proposal was adopted.

Paragraph 8 was adopted, with the additions proposed by Mr. Tladi and Mr. Hmoud.

Section B, as amended, was adopted.

C. Final report on the topic

Paragraph 9

Paragraph 9 was adopted.

1. Obligation to fight impunity in accordance with the rule of law

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

2. The importance of the obligation to extradite or prosecute in the work of the International Law Commission

Paragraph (3)

Paragraph (3) was adopted.

3. Summary of work

Paragraph (4)

15. Mr. MURPHY proposed adding an introductory sentence at the beginning of the paragraph, to read: "The following summarizes several key aspects of the Commission's work on this topic."

The proposal was adopted.

16. Mr. FORTEAU proposed replacing the words "of the Working Group" with "of the Commission" at the beginning of the last sentence.

17. Mr. KITTICHAISAREE (Chairperson of the Working Group) proposed instead that the beginning of that sentence be reworded to read: "The Commission decided to proceed on the understanding that …".

The proposal was adopted.

Paragraph (4) was adopted, subject to the requisite corrections pursuant to the amendments just made.

Paragraph (5)

18. Mr. MURPHY proposed amending the beginning of the paragraph to read: "The Commission considered useful to its work a wide range of materials, particularly: the Survey …".

19. Mr. KITTICHAISAREE (Chairperson of the Working Group) said that he supported the proposal and that, as a consequence, the words "useful in its work" at the end of the paragraph should be deleted.

Paragraph (5), as amended, was adopted.

Paragraphs (6) to (10)

Paragraphs (6) to (10) were adopted.

Paragraph (11)

20. Mr. MURPHY proposed replacing the words "The first category comprised …" with "The first category of international conventions contained …".

Paragraph (11), as amended, was adopted.

Paragraphs (12) to (14)

Paragraphs (12) to (14) were adopted.

Paragraph (15)

Paragraph (15) was adopted, with a minor drafting change proposed by Mr. Murphy.

Paragraphs (16) to (21)

Paragraphs (16) to (21) were adopted.

Paragraph (22)

21. Mr. FORTEAU said that the reference in the second footnote to the adoption of the draft articles on the expulsion of aliens must be amended to indicate that they had been adopted on second reading rather than on first reading at the current session.

Paragraph (22), as thus amended, was adopted.

Paragraphs (23) to (30)

Paragraphs (23) to (30) were adopted.

Paragraph (31)

22. Mr. MURPHY proposed indicating at the end of the paragraph that the Commission had decided at the current session to include the topic of crimes against humanity in its programme of work; the Secretariat could insert a reference in the section of the annual report that mentioned that decision.

Paragraph (31) was adopted subject to the amendments proposed by Mr. Murphy.

Paragraphs (32) to (59)

Paragraphs (32) to (59) were adopted.

Section C of chapter VI of the draft report of the Commission, as a whole, as amended, was adopted.

Chapter VI of the draft report of the Commission, as a whole, as amended, was adopted.

Chapter XI. *Protection of the environment in relation to armed conflicts* (A/CN.4/L.845)

23. The CHAIRPERSON invited the members of the Commission to consider chapter XI, contained in document A/CN.4/L.845, paragraph by paragraph.

A. Introduction

Paragraph 1

Paragraph 1 was adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraph 2

Paragraph 2 was adopted.

1. Introduction by the Special Rapporteur of the preliminary report

Paragraphs 3 to 6

Paragraphs 3 to 6 were adopted.

Section B.1 was adopted.

2. Summary of the debate

(*a*) General comments

Paragraph 7

24. After a discussion in which Mr. MURPHY, Ms. JACOBSSON (Special Rapporteur), Mr. VÁZQUEZ-BERMÚDEZ, Mr. FORTEAU, Mr. SABOIA and Sir Michael WOOD took part, the CHAIRPERSON proposed amending the penultimate sentence to read: "It was suggested that the legal entity to be protected under this topic was the environment itself."

Paragraph 7, as amended, was adopted.

(*b*) Scope and methodology

Paragraphs 8 to 14

Paragraphs 8 to 14 were adopted.

(*c*) Use of terms

Paragraphs 15 to 18

Paragraphs 15 to 18 were adopted.

(*d*) Sources and other material to be consulted

Paragraphs 19 and 20

Paragraphs 19 and 20 were adopted.

(*e*) Environmental principles and obligations

Paragraphs 21 to 24

Paragraphs 21 to 24 were adopted.

(*f*) Human rights and indigenous rights

Paragraphs 25 and 26

Paragraphs 25 and 26 were adopted.

(*g*) Future programme of work

Paragraphs 27 and 28

Paragraphs 27 and 28 were adopted.

Section B.2, as amended, was adopted.

3. Concluding remarks of the Special Rapporteur

Paragraphs 29 to 34

Paragraphs 29 to 34 were adopted.

Paragraph 35

25. Mr. KITTICHAISAREE proposed that the beginning of the first sentence be amended to read: "On the availability of evidence of State practice".

Paragraph 35, as amended, was adopted.

Paragraphs 36 and 37

Paragraphs 36 and 37 were adopted.

Section B.3, as a whole, as amended, was adopted.

Section B of chapter XI of the draft report of the Commission, as a whole, as amended, was adopted.

Chapter XI of the draft report of the Commission, as a whole, as amended, was adopted.

Chapter XIII. *The most-favoured-nation clause* (A/CN.4/L.847)

26. The CHAIRPERSON invited the Commission to consider chapter XIII, as contained in document A/CN.4/L.847, paragraph by paragraph.

A. Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 3 to 5

Paragraphs 3 to 5 were adopted.

1. Draft final report

Paragraphs 6 to 10

Paragraphs 6 to 10 were adopted.

2. Discussions of the Study Group

Paragraphs 11 to 14

Paragraphs 11 to 14 were adopted.

Section B was adopted.

Chapter XIII of the draft report of the Commission, as a whole, as amended, was adopted.

Chapter VIII. *Protection of the atmosphere* (A/CN.4/L.841)

27. The CHAIRPERSON invited the Commission to consider chapter VIII, as contained in document A/CN.4/L.841, paragraph by paragraph.

A. Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraph 3

Paragraph 3 was adopted.

1. Introduction by the Special Rapporteur of the first report

Paragraphs 4 to 8

Paragraphs 4 to 8 were adopted.

Section B.1 was adopted.

2. Summary of the debate

(*a*) General comments

Paragraph 9

28. Mr. NOLTE proposed that in the final sentence, the phrase "not so much what needed to be done to protect the atmosphere but rather" be deleted.

Paragraph 9, as amended, was adopted.

Paragraphs 10 and 11

Paragraphs 10 and 11 were adopted.

Paragraph 12

29. Mr. NOLTE proposed that in order to avoid confusion, the beginning of the first sentence should be amended to read "Some other members".

Paragraph 12, as amended, was adopted.

Paragraphs 13 to 16

Paragraphs 13 to 16 were adopted.

(*b*) Comments on draft guideline 1 (Use of terms)

Paragraph 17

30. Following an exchange of views between Mr. NOLTE and Mr. MURASE (Special Rapporteur), the CHAIRPERSON proposed amending the last sentence to read: "The point was also made that the definition ought to be simplified, without mentioning such terms as troposphere and stratosphere."

Paragraph 17, as amended, was adopted.

Paragraph 18

Paragraph 18 was adopted.

Paragraph 19

31. Mr. FORTEAU proposed that in the footnote to the paragraph, the link to the website simply be provided, without any further details.

Paragraph 19, as amended, was adopted.

Paragraphs 20 to 22

Paragraphs 20 to 22 were adopted.

(*c*) Comments on draft guideline 2 (Scope of the guidelines)

Paragraphs 23 to 26

Paragraphs 23 to 26 were adopted.

(*d*) Comments on draft guideline 3 (Legal status of the atmosphere)

Paragraph 27

32. Mr. NOLTE proposed inserting the word "certain" before "members" at the beginning of the second sentence.

Paragraph 27, as amended, was adopted.

Paragraph 28

Paragraph 28 was adopted.

Paragraph 29

33. Mr. NOLTE proposed merging paragraphs 29 and 30 to better highlight the different points of view expressed by members during the debate.

The proposal was adopted.

Paragraph 30

34. Mr. KITTICHAISAREE proposed replacing the word "Despite" with "Taking into account" in the first sentence.

Paragraph 30, as amended, was adopted.

Paragraph 31

35. Mr. MURASE (Special Rapporteur) proposed transposing the first sentence to paragraph 32.

Paragraph 31, as amended, was adopted.

Paragraphs 32 to 34

Paragraphs 32 to 34 were adopted.

(*e*) Other considerations

Paragraphs 35 to 38

Paragraphs 35 to 38 were adopted.

Section B.2, as amended, was adopted.

3. Concluding remarks of the Special Rapporteur

Paragraphs 39 to 45

Paragraphs 39 to 45 were adopted.

Section B.3 was adopted.

Chapter VIII of the draft report of the Commission, as a whole, as amended, was adopted.

Identification of customary international law (*concluded*)* (A/CN.4/666, Part II, sect. D, A/CN.4/672)

[Agenda item 9]

Report of the Drafting Committee

36. The CHAIRPERSON invited the Chairperson of the Drafting Committee to present the report made by the Drafting Committee at the sixty-sixth session of the Commission, concerning the identification of customary international law.

37. Mr. SABOIA (Chairperson of the Drafting Committee) said that the Drafting Committee had examined 9 of the 11 draft conclusions proposed by the Special Rapporteur in his second report (A/CN.4/672) and had provisionally adopted 8 of them, which he himself was now presenting for information only.[302] The last two draft conclusions, which dealt with the second element of practice (*opinio juris*), would be examined at the next session.

38. With regard to draft conclusion 1 (Scope), the Drafting Committee had considered that the term "methodology" should be avoided and, for the sake of simplicity, had decided to delete the original second paragraph of the draft conclusion, which had contained a "without prejudice" clause.

39. The former draft conclusion 2 on the use of terms had been set aside for the moment: the expression "For the purposes of the present draft conclusions" had been considered somewhat odd, as the draft conclusions were concerned with customary international law in general, and the definition in the draft conclusion was superfluous in light of the new draft conclusion 2.

40. With regard to the new draft conclusion 2 [3] (Two constituent elements), the original title had been kept in order to reflect the fact that the identification of customary international law was based on a two-element approach. The provision was at the core of the draft conclusions, which reaffirmed the approach followed in State practice and in the jurisprudence of international courts and tribunals, and was largely supported in the doctrine. For that reason, the Drafting Committee had considered it preferable to use "Basic approach", which covered both the two-element approach and the assessment of evidence for the two elements, as the title for Part II. It had also decided to add the term *opinio juris* in parentheses after "accepted as law".

41. With regard to draft conclusion 3 [4] (Assessment of evidence for the two elements), the words "for the two elements" had been added to the title for the sake of clarity, and the wording of the draft had been refined. The principle mentioned in the draft conclusion was an overarching one that applied to many of the draft conclusions that followed, such as the one concerning the forms of practice. The draft conclusion indicated that evidence for the determination of the two elements should not be assessed in isolation.

42. Regarding draft conclusion 4 [5] (Requirement of practice), the title of the former text had been amended. An extensive discussion had taken place in the Drafting Committee regarding the importance of State practice in the process of formation of rules of customary international law and on the relevance of the practice of other subjects of international law, especially international organizations. The question of the role, if any, of non-State actors had also been raised. The Drafting Committee had eventually opted for a formulation that first addressed the role of State practice and then the role of the practice of international organizations (and only of the international organizations themselves), on the understanding that the draft conclusion would be revisited in the future.

* Resumed from the 3227th meeting.

[302] The interim report of the Drafting Committee on the identification of customary international law is available from the Commission's website at: http://legal.un.org/docs/?path=../ilc/sessions/66/pdfs/english/dc_chairman_statement_identification_of_custom.pdf&lang=E.

43. With regard to draft conclusion 5 [6] (Conduct of the State as State practice), the title of the former draft had been refined and, following a discussion on the issue, it had been decided to no longer refer to the concept of "attribution", the prevailing opinion being that the language used in the draft conclusions should be accessible.

44. In relation to draft conclusion 6 [7] (Forms of practice), the concept of inaction, which had originally been dealt with in a separate paragraph, had been moved to the end of the first paragraph. The non-exhaustive nature of the list of forms of practice contained in paragraph 2 was emphasized by the words "but are not limited to". The formulation "executive conduct, including operational conduct 'on the ground'" had been discussed at length. It referred generally to the conduct of the executive authorities and included the physical conduct of Governments, such as military operations in the context of a conflict. The "decisions of national courts" were to be understood broadly, as covering also relevant interlocutory decisions. The commentary to the draft conclusions would discuss other forms of practice not expressly included in the text. Paragraph 3, which contained the text of paragraph 1 of the former draft conclusion 8, had been placed after the list of forms of practice, the order of which had been chosen only as a matter of drafting.

45. With regard to draft conclusion 7 [8] (Assessing a State's practice), the Drafting Committee had included in the first paragraph the statement that State practice should be taken as a whole, a requirement that had recently been recalled by the International Court of Justice. In the second paragraph, it was indicated that the weight given to a practice "may" be reduced. The use of the word "may" meant that the issue needed to be approached with caution, since the weight given to a practice that varied did not necessarily have to be reduced in all cases—for instance, when the lower and higher organs of the same State did not follow the same practice, it did not necessarily follow that less weight should be given to the practice of the higher organs.

46. With regard to draft conclusion 8 [9] (The practice must be general), its title emphasized the key aspect of the assessment of the material element of custom, which was a "general practice". It had been stated in paragraph 4 of the former draft conclusion 9 that "[d]ue regard should be given to the practice of States whose interests are specially affected". Bearing in mind the concerns that had been raised, there was no reference to that subject in the current draft conclusion and it would be further examined at the next session. The requirement that practice must be consistent was mentioned in the first paragraph, as it was inherent in the concept of generality of practice. Although, as it emerged from the jurisprudence of the International Court of Justice, no particular duration was required for a practice to be conclusive, paragraph 2 should not be interpreted as a recognition of "instant custom".

47. In conclusion, he said that the Drafting Committee hoped to submit formally a set of draft conclusions for adoption at the sixty-seventh session.

The meeting rose at 6.15 p.m.

3243rd MEETING

Friday, 8 August 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the Commission on the work of its sixty-sixth session (*concluded*)

Chapter X. ***Identification of customary international law*** **(A/CN.4/L.843)**

1. The CHAIRPERSON invited the Commission to consider chapter X of its draft report, as contained in document A/CN.4/L.843.

2. Sir Michael WOOD (Special Rapporteur), recalling that a considerable number of editorial errors had been introduced into the text of his second report (A/CN.4/672), said that a corrected version would be issued and made available on the Commission's website. While the United Nations had its own editorial style rules, they should be applied with some flexibility when dealing with legal texts.

A. Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraph 3

3. Sir Michael WOOD (Special Rapporteur) requested that the paragraph be altered to refer to the corrected version of his second report, once its symbol was known.

On that understanding, paragraph 3 was adopted.

4. Sir Michael WOOD (Special Rapporteur) proposed the addition of a new paragraph after paragraph 3, to read:

> "At its 3227th meeting, the Commission decided to refer the draft conclusions in the second report to the Drafting Committee. At its 3242nd meeting, on 7 August 2014, the Chairperson of the Drafting Committee presented the interim report of the Drafting Committee, containing the eight draft conclusions provisionally adopted by the Drafting Committee at the sixty-sixth session. The report, together with the draft conclusions, was presented for information only and is available on the Commission website."

The new paragraph was adopted.

1. Introduction by the Special Rapporteur of the second report

Paragraph 4

Paragraph 4 was adopted.

Paragraph [5]

5. Sir Michael WOOD (Special Rapporteur) suggested that, in the second sentence, the words "some of the terms that were considered useful to define" be changed to "some of the terms that it might be useful to define". He added that he would submit a number of minor editorial amendments directly to the Secretariat.

On that understanding, paragraph [5], as amended, was adopted.

Paragraphs 5 to 14

Paragraphs 5 to 14 were adopted.

Section B.1, as amended, was adopted.

2. Summary of the debate

(*a*) General comments

Paragraphs 15 and 16

Paragraphs 15 and 16 were adopted.

Paragraph 17

6. Mr. KITTICHAISAREE, referring to the last sentence of the paragraph, recalled Mr. Kamto's remarks during the debate to the effect that the International Court of Justice was the principal judicial organ of the United Nations and that the Commission should not challenge its jurisprudence; he also recalled the exchange that had followed. He suggested that the paragraph be amended to better capture that debate.

7. Sir Michael WOOD (Special Rapporteur) said that changing the words "other international courts and tribunals" to "other, more specialized courts and tribunals" might take account of that concern.

8. Mr. VÁZQUEZ-BERMÚDEZ said that there was a close, even symbiotic, relationship between the Court and the Commission, as reflected in the work of each. The last sentence of paragraph 17 could send an unfortunate message; he suggested that it be deleted altogether.

9. Mr. TLADI, while agreeing with the position taken by Mr. Vázquez-Bermúdez, observed that the text must accurately reflect the debate that had taken place. An additional sentence indicating that the members of the Commission had generally considered it appropriate to refer to the Court's rulings might strike the right balance.

10. Mr. MURPHY suggested that a simpler solution might be to replace the word "overreliance" with "exclusive reliance".

11. Sir Michael WOOD (Special Rapporteur) said he favoured the simple approach.

Paragraph 17, as amended by the Special Rapporteur and Mr. Murphy, was adopted.

Paragraph 18

12. Mr. KITTICHAISAREE suggested a minor editorial amendment to the English version of the text.

Paragraph 18, as amended, was adopted.

Paragraph 19

Paragraph 19 was adopted.

(*b*) Use of terms

Paragraph 20

Paragraph 20 was adopted.

Paragraph 21

13. Mr. MURPHY suggested that, in the third and fourth sentences, the word "doctrine" be altered to "writings".

Paragraph 21, as amended, was adopted.

(*c*) Basic approach

14. Mr. VÁZQUEZ-BERMÚDEZ proposed the insertion of a new paragraph at the beginning of the section to read:

> "Several members of the Commission agreed that the subjective element of custom, *opinio juris*, was not synonymous with the 'consent' or 'will of States', but rather signified a belief that a particular practice was followed in exercise of a right or to comply with an obligation under international law" ["*Varios miembros de la Comisión coincidieron en que el elemento sujetivo de la costumbre, la* opinio juris, *no es sinónimo de 'consentimiento' o 'voluntad de los Estados', sino que significa la creencia de que una determinada práctica es seguida porque se está ejerciendo un derecho o cumpliendo con una obligación conforme al derecho internacional*"]..

15. Sir Michael WOOD (Special Rapporteur) agreed to that proposal, on the understanding that the text would be submitted in writing for official translation.

On that understanding, the additional paragraph proposed by Mr. Vázquez-Bermúdez was adopted.

Paragraph 22

16. Mr. NOLTE suggested that, in the second sentence, the phrase "was generally supported among the members of the Commission" be changed to "was supported by most members of the Commission". The original wording suggested that the view in question had enjoyed broader support than had been the case.

17. Mr. KITTICHAISAREE suggested that, in the last sentence of the paragraph, the phrase "there were different approaches" be altered to "there appeared to be different approaches".

Paragraph 22, as amended, was adopted.

Paragraphs 23 and 24

Paragraphs 23 and 24 were adopted.

(*d*) "A general practice"

Paragraph 25

Paragraph 25 was adopted.

Paragraph 26

18. Mr. NOLTE proposed that the final sentence be made more emphatic by replacing the word "could" with "would".

Paragraph 26, as amended, was adopted.

Paragraph 27

19. Mr. NOLTE suggested that the words "for the purposes of customary international law" be added at the end of the third sentence, as acts carried out *ultra vires* could in fact serve as State practice in certain contexts. He further suggested that the last sentence be altered to read: "The question whether conduct of non-State actors acting on behalf of the State constituted relevant practice was also raised in this regard."

Paragraph 27, as amended, was adopted.

Paragraph 28

20. Mr. NOLTE suggested that, in the third sentence, the words "solely verbal acts" should be changed to "verbal acts by themselves".

Paragraph 28, as amended, was adopted.

Paragraphs 29 and 30

Paragraphs 29 and 30 were adopted.

Paragraph 31

21. Mr. NOLTE proposed that the words "of a State's practice as a whole" be added at the end of the first sentence.

Paragraph 31, as amended, was adopted.

Paragraphs 32 and 33

Paragraphs 32 and 33 were adopted.

Paragraph 34

22. Mr. VÁZQUEZ-BERMÚDEZ said that, at the beginning of the fourth sentence, the words "Those members" should be altered to "Other members", to avoid confusion. He proposed the addition of a new third sentence, to read: "It was pointed out that all States had an interest in the content, scope, creation and development of general international law in all fields, and that the practice of all States, whether through action or inaction, therefore carried the same weight" ["*Se afirmó que todos los Estados tienen interés en el contenido y alcance, en la generación y evolución del derecho internacional general en todos los ámbitos, por lo cual la práctica de todos ellos, ya sea por acción o inacción, tiene el mismo valor*"].

23. Sir Michael WOOD (Special Rapporteur) said that the proposed wording was too strong. Although the view described was held by some States, the weight to be accorded to State practice might depend on the particular circumstances involved.

24. Mr. PETRIČ expressed the view that the proposed addition was intended to reflect one of the positions taken during the debate, rather than that of the Commission.

25. Sir Michael WOOD (Special Rapporteur) said that some form of caveat to that effect should be included.

26. Mr. TLADI suggested that Sir Michael's concern might be allayed by changing the phrase "carried the same weight" in the proposed new sentence to "was equally relevant".

Paragraph 34, as amended by Mr. Vázquez-Bermúdez and Mr. Tladi, was adopted.

(*e*) "Accepted as law"

27. Mr. VÁZQUEZ-BERMÚDEZ suggested that the term *opinio juris* be included in parentheses at the end of the title.

It was so decided.

Paragraph 35

28. Mr. NOLTE proposed the deletion of the word "perhaps" in the final sentence.

Paragraph 35, as amended, was adopted.

Paragraph 36

29. Mr. KITTICHAISAREE suggested that, in the third sentence, the words "saw no issue" should be altered to "had no difficulty" or "had no problem", for ease of understanding.

30. Sir Michael WOOD (Special Rapporteur) said that the word "issue" could simply be changed to "problem".

Paragraph 36, as amended by the Special Rapporteur, was adopted.

Paragraph 37

31. Mr. KITTICHAISAREE proposed a new sentence for inclusion after the second sentence, to read: "Other members considered that such acceptance need not be nearly universal to establish such a rule."

32. Mr. MURPHY suggested that inserting "but not other members" after "some members" in the original second sentence might be sufficient on its own to capture Mr. Kittichaisaree's point, without adding an additional sentence.

33. Mr. KITTICHAISAREE agreed to that suggestion.

Paragraph 37, as amended by Mr. Murphy, was adopted.

Section B.2, as amended, was adopted.

3. Concluding remarks of the Special Rapporteur

Paragraphs 38 to 51

Paragraphs 38 to 51 were adopted.

Section B.3, as amended, was adopted.

Section B as a whole, as amended, was adopted.

Chapter X of the report of the Commission, as a whole, as amended, was adopted.

Chapter XII. *Provisional application of treaties* (A/CN.4/L.846)

34. The CHAIRPERSON invited the Commission to begin its consideration of chapter XII of the draft report, as contained in document A/CN.4/L.846.

A. Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 3 and 4

Paragraphs 3 and 4 were adopted.

Paragraph 4 *bis*

35. The CHAIRPERSON drew attention to a proposal for an additional paragraph 4 *bis*, to read:

> "At the 3243rd meeting, held on 8 August 2014, the Commission decided to request from the Secretariat a memorandum on the previous work undertaken by the Commission on this subject in the *travaux préparatoires* of the relevant provisions of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations."

Paragraph 4 bis was adopted.

1. Introduction by the Special Rapporteur of the first report

36. Mr. KITTICHAISAREE pointed out that, in the English version of the heading, the word "first" should be replaced with "second".

Paragraphs 5 to 7

Paragraphs 5 to 7 were adopted.

Paragraph 8

37. Mr. MURPHY said that, in the third sentence, the phrase "had been manifested" should be reworded more tentatively, to read "might be manifested", since as yet there was no example of one of the possible scenarios contemplated by the Special Rapporteur.

Paragraph 8, as amended, was adopted.

Paragraph 9

Paragraph 9 was adopted.

Paragraph 10

38. Mr. MURPHY proposed that the first sentence be deleted, since it essentially repeated the context of the second sentence of paragraph 9.

Paragraph 10 was adopted with that amendment.

Paragraphs 11 and 12

Paragraphs 11 and 12 were adopted.

Section B.1, as amended, was adopted.

2. Summary of the debate

Paragraph 13

39. Mr. NOLTE proposed that, in the first sentence, the word "general" be replaced with "broad", because a number of members had questioned the rather strong statement that the legal effects of the provisional application of a treaty were the same as if the treaty were in force.

The proposal was adopted.

40. Mr. KITTICHAISAREE said that the phrase "In terms of a further view" in the final sentence seemed rather strange and should be revised. He proposed that, in the first sentence, a footnote be inserted after the phrase "in force for that State", to read: "However, it was not clarified whether the provisional application of treaties has legal effects that go beyond the provisions of article 18 of the Vienna Convention on the Law of Treaties."

41. The CHAIRPERSON suggested that the phrase "In terms of a further view" be replaced with "According to another view". With regard to the proposed footnote, he said that it would be more appropriate if the text read out by Mr. Kittichaisaree were inserted into the paragraph itself.

Paragraph 13, thus amended, was adopted.

Paragraph 14

Paragraph 14 was adopted.

Paragraph 15

42. Mr. NOLTE proposed that the first sentence be reworded to begin "Some members expressed support", since that formulation would reflect the relative positions of members in the debate better than the current wording. With regard to the third sentence, he said that the intended meaning was not clear and that the word "validity" seemed out of place. He therefore suggested that either the sentence be deleted or "validity" be replaced with a more suitable alternative.

43. Mr. VÁZQUEZ-BERMÚDEZ, responding to Mr. Nolte's concern with regard to the appropriateness of "validity", said that it was his understanding that the sentence was intended to capture the idea that recourse to a clause permitting the provisional application of a treaty was not only a question of international law, but also of domestic legislation. He therefore proposed that the sentence begin "It was agreed that recourse to a clause".

44. Mr. SABOIA said he thought the sentence sought to express the idea that some consideration should be given to domestic law because some countries had provisions in their constitutions or legislation that did not permit the provisional application of treaties. As to its deletion, he had no strong views either way.

45. Ms. ESCOBAR HERNÁNDEZ and Mr. TLADI said that the proposal by Mr. Vázquez-Bermúdez was acceptable.

46. Mr. MURPHY said that he was in favour of the approach taken by Mr. Vázquez-Bermúdez, but would prefer the sentence to begin "It was observed that a State's resort to a clause".

The proposal was adopted.

47. Mr. KITTICHAISAREE, referring to the fourth sentence, said that the word "legislative" should be replaced with "constitutional" because the debate had been on the constitutionality of a clause permitting provisional application.

48. Mr. NOLTE said that, while any study would be mostly concerned with the constitutional practice of States, consideration might also need to be given to relevant legislative practice. Furthermore, in most legal systems the adoption of, or amendment to, a constitution was considered to be a form of legislative practice. He was therefore in favour of maintaining the phrase "legislative practice".

49. Mr. PETRIČ said that constitutional practice and legislative practice were two different matters: the first related mainly to the decisions of constitutional courts. He therefore proposed the insertion of "constitutional and" before "legislative".

50. Mr. ŠTURMA supported that proposal.

51. Sir Michael WOOD said that in some countries the practice concerned might be neither constitutional nor legislative but, for example, customary.

52. Mr. SABOIA said that he agreed with the proposal by Mr. Petrič. However, in order to cover Sir Michael's point, he proposed the following wording: "constitutional, legislative and any other relevant practice of States."

The proposal was adopted.

Paragraph 15, as amended, was adopted.

Paragraphs 16 to 20

Paragraphs 16 to 20 were adopted.

Section B.2, as amended, was adopted.

3. Concluding remarks of the Special Rapporteur

Paragraphs 21 to 25

Paragraphs 21 to 25 were adopted.

Section B.3, as amended, was adopted.

Section B, as a whole, as amended, was adopted.

Chapter XII of the report of the Commission, as a whole, as amended, was adopted.

Chapter I. ***Introduction*** **(A/CN.4/L.834)**

Paragraph 1

Paragraph 1 was adopted.

A. Membership

Paragraph 2

Paragraph 2 was adopted.

B. Officers and the Enlarged Bureau

Paragraph 3

Paragraph 3 was adopted with a minor editorial amendment to the English text.

Paragraphs 4 and 5

Paragraphs 4 and 5 were adopted.

C. Drafting Committee

Paragraphs 6 and 7

Paragraphs 6 and 7 were adopted.

D. Working Groups and Study Group

Paragraphs 8 and 9

Paragraphs 8 and 9 were adopted.

E. Secretariat

Paragraph 10

Paragraph 10 was adopted.

F. Agenda

Paragraph 11

Paragraph 11 was adopted.

Chapter I of the report of the Commision, as a whole, as amended, was adopted.

Chapter II. ***Summary of the work of the Commission at its sixty-sixth session*** **(A/CN.4/L.835)**

Paragraph 1

53. Mr. MURPHY suggested that it might be appropriate to note that the Commission had had before it the ninth report of the Special Rapporteur on the expulsion of aliens, which dealt with the comments and observations of States (A/CN.4/670).

54. Mr. KORONTZIS (Secretary of the Commission) said that it was not customary to mention such reports in the context of a text's adoption on second reading. However, the Secretariat would verify the point and amend the paragraph if appropriate.

Paragraph 1 was adopted on that understanding.

Paragraph 2

Paragraph 2 was adopted.

Paragraph 3

55. Mr. VALENCIA-OSPINA, referring to the final sentence, proposed that the words "including the" should be inserted before "Office for the Coordination of Humanitarian Affairs". That would allow the Secretariat to request comments and observations from United Nations offices other than those specifically indicated, if it considered it appropriate to do so.

Paragraph 3 was adopted with that amendment and an editorial correction to the final sentence.

Paragraphs 4 to 7

Paragraphs 4 to 7 were adopted.

Paragraph 8

56. Sir Michael WOOD said that the final sentence was not entirely accurate, since the Commission had not taken note of the report of the Drafting Committee. He suggested that it be reformulated along the following lines: "The report of the Chairperson of the Drafting Committee, including the eight draft conclusions provisionally adopted by the Committee, was submitted to the Commission for information (chap. X)."

57. Mr. VÁZQUEZ-BERMÚDEZ proposed that, for the sake of consistency with what had been previously agreed upon, the words *opinio juris* be inserted after the phrase "'accepted as law'" at the end of the first sentence.

Paragraph 8 was adopted with those two amendments.

Paragraph 9

Paragraph 9 was adopted.

Paragraph 10

58. Mr. TLADI (Rapporteur) drew attention to a new version of paragraph 10, which read:

> "10. As regards the topic 'Provisional application of treaties', the Commission had before it the second report of the Special Rapporteur (A/CN.4/675), which sought to provide a substantive analysis of the legal effects of the provisional application of treaties. The debate revealed general agreement that the basic premise underlying the topic was that, subject to the specificities of the treaty in question, the rights and obligations of a State that had decided to provisionally apply the treaty, or parts thereof, were the same as if the treaty were in force for that State (chap. XII)."

59. Mr. NOLTE asked whether the paragraph described a decision that had been taken by the Commission.

60. Mr. TLADI (Rapporteur) said that it was a description of the debate that had taken place and a summary of what the Commission had adopted in chapter X. He proposed that, in order to track the language of that summary more closely, the word "general" in the second sentence be replaced with "broad".

Paragraph 10 was adopted with that amendment.

Paragraphs 11 to 13

Paragraphs 11 to 13 were adopted.

Paragraph 14

Paragraph 14 was adopted, subject to its completion by the Secretariat.

Chapter II of the report of the Commission, as a whole, as amended, was adopted.

Chapter III. ***Specific issues on which comments would be of particular interest to the Commission*** **(A/CN.4/L.836)**

A. Subsequent agreements and subsequent practice in relation to treaty interpretation

Paragraph 1

61. Mr. MURPHY said that, in order to align the paragraph with those that followed, the beginning of the first sentence should be deleted and the first part amended to read: "The Commission requests, by 31 January 2015, States and international organizations …".

Paragraph 1 was adopted with that amendment.

B. Protection of the atmosphere

Paragraph 2

Paragraph 2 was adopted.

C. Immunity of State officials from foreign criminal jurisdiction

Paragraph 3

62. Mr. MURPHY said that in subparagraph (ii) of the English text, the word "the" should be replaced with "any".

Paragraph 3 was adopted with that amendment to the English version.

D. Identification of customary international law

Paragraph 4

63. Ms. ESCOBAR HERNÁNDEZ proposed replacing the word "suitable" (*adecuados*) with "used" (*empleados*), as the word "suitable" implied a value judgment, something that the Commission was not in the habit of requesting States to provide.

64. Sir Michael WOOD (Special Rapporteur) proposed simply to delete the word "suitable".

Paragraph 4, as amended by Sir Michael Wood, was adopted.

Paragraph 5

Paragraph 5 was adopted.

E. Protection of the environment in relation to armed conflicts

Paragraph 6

65. Mr. MURPHY said that, having obtained the approval of the Special Rapporteur, he proposed to replace

the words "would like to have", in the first sentence, with "requests", and to insert the words "by 31 January 2015" between the words "States" and "on".

Paragraph 6 was adopted with those amendments.

Paragraph 7

66. Mr. MURPHY proposed that, in the first sentence, the words "implemented" be deleted. In the second sentence, the word "all" was superfluous and should be deleted, and a hyphen should be inserted between the words "defence" and "related". He had obtained the Special Rapporteur's approval of those amendments.

Paragraph 7 was adopted with those amendments.

F. Provisional application of treaties

Paragraph 8

Paragraph 8 was adopted.

G. Crimes against humanity

Paragraph 9

67. Mr. MURPHY (Special Rapporteur) proposed that the words "by 31 January 2015," be inserted between the words "information" and "on".

68. Ms. ESCOBAR HERNÁNDEZ proposed, in subparagraph (*c*), deleting the portion of the text in parentheses, since the circumstances in which jurisdiction could be exercised over crimes against humanity varied widely from one State to the next. In the same subparagraph, she pointed out that the use of the word "offender" (*infractor*) could be interpreted as infringing the principle of the presumption of innocence.

69. Mr. MURPHY (Special Rapporteur) proposed that the examples in parentheses be retained because their purpose was simply to give States an idea of the type of information in which the Commission was interested.

That proposal was adopted.

70. Mr. CANDIOTI proposed that, in order to address the concerns expressed by Ms. Escobar Hernández, the words "an offender for" be replaced with "a person accused of" or "a person charged with". The deadline for the provision of information to the Commission, which had been set for 31 January 2015 with respect to all topics, was unrealistically short, especially as States might not be informed of it until after the conclusion of the sixty-ninth session of the General Assembly.

71. After a procedural discussion in which Mr. MURPHY (Special Rapporteur), Ms. ESCOBAR HERNÁNDEZ, Mr. NOLTE and Sir Michael WOOD participated, Mr. MURPHY proposed to refer to "an alleged offender", the term most often used in the relevant treaties, in order to allay the concerns raised by Ms. Escobar Hernández.

That proposal was adopted.

72. The CHAIRPERSON suggested that the Commission maintain the 31 January 2015 deadline with respect to all topics.

It was so decided.

Paragraph 9, as amended, was adopted.

Chapter III of the report of the Commission, as a whole, as amended, was adopted.

Chapter XIV. *Other decisions and conclusions of the Commission* (A/CN.4/L.848)

73. The CHAIRPERSON invited the Commission to consider the section of chapter XIV of the draft report contained in document A/CN.4/L.848.

A. Programme, procedures and working methods of the Commission and its documentation

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

1. Inclusion of new topics on the programme of work of the Commission

74. Mr. CANDIOTI proposed that, in the title of section 1, the word "topics" be replaced with the singular word "topic", since there was only one new topic.

That proposal was adopted.

Paragraph 4

Paragraph 4 was adopted.

2. Working Group on the long-term programme of work

Paragraphs 5 to 10

Paragraphs 5 to 10 were adopted.

3. Consideration of General Assembly resolution 68/116 of 16 December 2013 on the rule of law at the national and international levels

Paragraphs 11 to 18

Paragraphs 11 to 18 were adopted.

4. Honoraria

Paragraph 19

Paragraph 19 was adopted.

5. Documentation and publications

Paragraphs 20 to 23

Paragraphs 20 to 23 were adopted.

6. Trust fund on the backlog relating to the *Yearbook of the International Law Commission*

Paragraph 24

Paragraph 24 was adopted.

7. Assistance of the Codification Division

Paragraph 25

Paragraph 25 was adopted.

8. *Yearbook of the International Law Commission*

Paragraph 26

75. Mr. MURPHY proposed that the word "advancing" be replaced with "producing".

76. In response to a query from Sir Michael WOOD, Mr. KORONTZIS (Secretary of the Commission) proposed to insert the words "production of the" between the words "the" and "*Yearbook*".

Paragraph 26, as amended, was adopted.

9. Websites

Paragraph 27

77. Ms. ESCOBAR HERNÁNDEZ, supported by Mr. VÁZQUEZ-BERMUDEZ, said that she wished to emphasize her own gratitude, as well as that of other Spanish-speaking members of the Commission and of the international community, for the enormous efforts carried out by the Secretariat over the past several years to digitize and publish the entire collection of the Commission's documents in Spanish on the Commission's website.

Paragraph 27 was adopted.

10. United Nations Audiovisual Library of International Law

Paragraph 28

78. Mr. CANDIOTI proposed that the website address of the United Nations Audiovisual Library of International Law be included in a footnote to paragraph 28.

79. The CHAIRPERSON said that the Secretariat would ensure that such a reference was included.

On that understanding, paragraph 28 was adopted.

Section A as a whole, as amended, was adopted.

B. Date and place of the sixty-seventh session of the Commission

Paragraph 29

Paragraph 29 was adopted.

Paragraph 30

80. In response to a comment by Mr. VALENCIA-OSPINA, Mr. KORONTZIS (Secretary of the Commission) said that there were a few items that appeared in chapter XIV that did not necessarily appear in the summary of the Commission's work in chapter II. The Secretariat considered that the information contained in paragraph 30 was part of a broader debate and should not be reflected in the summary.

81. Mr. MURPHY said that he hoped that the Secretariat would nevertheless attempt to determine the feasibility of holding a part of future sessions in New York and inform the Commission of its findings before the sixty-seventh session, so that an informed discussion could be held on the advisability of such a course of action.

82. Following a comment by Mr. KITTICHAISAREE, Mr. CANDIOTI proposed that the word "recalled" be replaced with "considered".

Paragraph 30, as amended by Mr. Candioti, was adopted.

Section B as a whole, as amended, was adopted.

C. Cooperation with other bodies

Paragraph 31

Paragraph 31 was adopted.

Paragraph 32

83. Mr. MURPHY said that, in the second sentence, the words "Formation and evidence" should be replaced with "Identification".

Paragraph 32, as amended, was adopted.

Paragraph 33

Paragraph 33 was adopted.

Paragraph 34

84. Ms. ESCOBAR HERNÁNDEZ proposed that, at the beginning of the first sentence, the words "European Committee on Legal Cooperation and" be deleted, as that body had not been represented at the present session of the Commission.

Paragraph 34, as amended, was adopted.

Paragraph 35

With an editorial amendment proposed by Mr. Peter, paragraph 35 was adopted.

Section C as a whole, as amended, was adopted.

D. Representation at the sixty-ninth session of the General Assembly

Paragraph 36

85. The CHAIRPERSON said that, after consultation with several members of the Commission, he suggested that the Commission should request Mr. Valencia-Ospina, Special Rapporteur on the topic of protection of persons in the event of disasters, to attend the sixty-ninth session of the United Nations General Assembly, provided that adequate financial resources were available. He further suggested that a paragraph to that effect be added in section D.

On that understanding, paragraph 36 was adopted.

Section D, as amended, was adopted.

86. Mr. VALENCIA-OSPINA expressed his appreciation to the Commission for the confidence expressed in him.

E. International Law Seminar

Paragraphs 37 to 39

Paragraphs 37 to 39 were adopted.

Paragraph 40

Paragraph 40 was adopted, with a minor editorial amendment proposed by Mr. Kittichaisaree to the English text.

Paragraphs 41 to 48

Paragraphs 41 to 48 were adopted.

Section E, as amended, was adopted.

F. Commemoration of the 50th anniversary of the International Law Seminar

Paragraph 49

Paragraph 49 was adopted.

Section F was adopted.

Chapter XIV of the report of the Commission, as a whole, as amended, was adopted.

The report of the International Law Commission on the work of its sixty-sixth session, as a whole, as amended, was adopted.

Chairperson's concluding remarks

87. The CHAIRPERSON said that the sixty-sixth session had been a productive one. He was grateful to all the members of the Commission for their cooperation, and to his colleagues on the Bureau and the former chairpersons of the Commission for their advice and guidance in managing the Commission's work. He was also grateful for the competent assistance and continuous support provided by the Secretariat, the Codification Division and the Legal Liaison Office in Geneva. He wished to thank all the précis-writers, interpreters, conference officers, translators and other members of conference services who performed services for the Commission daily.

Closure of the session

88. After the customary exchange of courtesies, the CHAIRPERSON declared the sixty-sixth session of the International Law Commission closed.

The meeting rose at 12.30 p.m.

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